

Fiscal Federalism and Centrally Sponsored Schemes:

Rethinking Article 282 of the Constitution

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I. Introduction

A. Context

Over the years, India's fragile healthcare system has suffered from a lack of financial resources, poor infrastructure, and insufficient manpower.¹ The outbreak of COVID-19 has further exposed the fault lines in the country's healthcare system, some of which are the consequence of under-investment in the healthcare sector. Inadequate public health spending has been one of the principal reasons for the poor healthcare system in the country. In the Financial Year 2019-20, India's public health expenditure was 1.5 per cent of the country's Gross Domestic Product (GDP).² This figure stood at 1.8 per cent of the GDP in the Financial Year 2020-2021.³ In the backdrop of the COVID-19 pandemic, the Central Government has ramped up public expenditure on health by 137 per cent in the Union Budget of 2021-22.⁴ Despite the increase, the overall healthcare spending in India still does not compare well with other jurisdictions.⁵

It is worth mentioning that the subject of 'Public health' falls under Entry 6⁶ of List II (the State List) in the Seventh Schedule of the Constitution of India. This means that States hold the primary responsibility to legislate on health and deliver health-related services. A few entries in the Concurrent List also touch upon subjects that indirectly or tangentially pertain to health / public health,⁷ thereby falling within the legislative and executive domain of both the Centre and the States. In accordance with the 'List System', Article 246 of the Constitution of India read with the Seventh Schedule distributes the exclusive legislative powers of the Union and the States into three lists: *Union, State and Concurrent*. Articles 73 and 162 divide the executive powers of the Union and the States in line with the legislative powers. Broadly, the Union List mentions subjects of national importance like defence, foreign relations, and communication (to name a few) whereas the State List enumerates subjects of local and regional importance like police, agriculture, public health, and other subjects associated with welfare. While the Centre and the States enjoy exclusive legislative and executive powers on the Union and State Lists respectively, both can legislate on subjects under the Concurrent List.

Discussions around expenditure on welfare-related subjects, such as healthcare, must remain cognizant of the scheme of distribution of resources between the Centre and the States. States' autonomy in their constitutionally allocated spheres can be meaningfully enjoyed only with the availability of adequate financial resources. To facilitate that, the Constitution lays down a detailed architecture of fiscal relations between the Centre and the States. The manner of distribution of powers under the Seventh Schedule, rather inevitably, created a fiscal gap

¹ According to the UNDP Human Development Report 2010, India ranked 119th out of 193 countries on the Human Development Index. See, 'The Real Wealth of Nations: Pathways to Human Development' (UNDP Human Development Report 2010) <http://hdr.undp.org/sites/default/files/reports/270/hdr_2010_en_complete_reprint.pdf> accessed 15 April 2021.

² Viswanath Pillai, 'Economic Survey 2020: Expenditure on healthcare continues to be flat', *Moneycontrol* (31 January 2020) <www.moneycontrol.com/news/economy/policy/economic-survey-2020-expenditure-on-healthcare-continues-to-be-flat-4888481.html> accessed 22 April 2021.

³ Ministry of Finance, 'Economic Survey 2020-2021: Vol 2, Chapter 10' (*Government of India*, 2021) 327 <https://www.indiabudget.gov.in/economicsurvey/doc/echapter_vol2.pdf> accessed 21 April 2021.

⁴ 'India's health budget to go up by 137% to over ₹2.2 lakh crore', *The Hindu Business Line* (New Delhi, 1 February 2021) <www.thehindubusinessline.com/economy/budget/indias-health-budget-to-go-up-by-137-to-over-22-lakh-crore/article33715311.ece> accessed 01 April 2021. This figure, however, has been criticised for being misleading. See, Pritam Datta and Chetana Chaudhuri, 'A 137% Hike in Health Budget? Here are the Correct Numbers' (*News Click*, 5 February 2021) <<https://www.newsclick.in/Correct-numbers-for-health-budget-allocation>> accessed 27 June 2021.

⁵ Dr Louise Tillin and Sandhya Venkateswaran, 'A democratic health check: why India shows the need for democracies to prioritise healthcare' in *Building Back Better Together: A Blueprint for a Better World* (School of Global Affairs, King's College London, June 2021) 26 <www.kcl.ac.uk/global-affairs/assets/buildbackbettertogether-g7report-final.pdf> 25 June 2021.

⁶ The Constitution of India 1950, sch VII entry 6: 'Public health and sanitation; hospitals and dispensaries'.

⁷ Some such Concurrent List entries are: Entry 16 - Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient; Entry 18 - Adulteration of foodstuffs and other goods; Entry 19 - Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium; Entry 20A - Population control and family planning; Entry 29 - Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

between the Centre and the States, and a consequent vertical fiscal imbalance. The Constitution assigned greater revenue-raising powers to the Union, whereas much of the expenditure responsibilities, particularly those pertaining to welfare and development of the citizens, were assigned to the States. The Report of the Fifteenth Finance Commission notes that in 2018-19, the States had only 37.3 per cent of the resources but were responsible for 62.4 per cent of the expenditure that was incurred.⁸

The framework of the Constitution seeks to address this vertical fiscal imbalance by carving out provisions for intergovernmental transfers under specific provisions of the Constitution. Part XII of the Constitution provides a comprehensive framework for transfers through the sub-chapters titled *Distribution of Revenues between the Union and the States* (spanning across Articles 268-281) and *Miscellaneous Financial Provisions* (Articles 282-291). Transfers from the Centre to the States are carried out through multiple channels, such as Articles 270 and 275, which provide for the distribution of the taxes between the Union and the States that are levied and collected by the Union, and for the payment of grants-in aids of the revenues of the States, respectively as per the Finance Commission's recommendations. Then there is also Article 282 which enables the Union or States to make discretionary grants, even beyond their respective legislative competences, for any 'public purpose'.

These fiscal transfers between the Union and the States have been carried out through multiple routes – via the Finance Commission, the erstwhile Planning Commission, and various Central Ministries. Under Article 280 of the Constitution, the Finance Commission has been vested with the power to recommend the allocation of centrally administered taxes and grants-in-aid to the States.⁹ The Planning Commission was constituted for planning socio-economic development at the national level, and for dispensing 'Plan assistance' to the States.¹⁰ It gave recommendations on the grants and loans to be provided to the States for financing their plan expenditure.¹¹ It must be noted that the Planning Commission was not established by or under the Constitution, and was the product of a Cabinet notification issued in 1950.¹²

Upon coming into existence, the Planning Commission recommended several Centrally Sponsored Schemes (CSSs) which were implemented by transfers routed via Article 282. As this report will explain, Article 282 lifts the embargo placed under Article 162 upon the Union's power to act in respect of areas within the State's exclusive domain. CSSs, by their nature, are discretionary transfers made by the Union to the States, and routinely pertain to subjects within the State or Concurrent Lists. CSSs are designed, and partially funded, by the Central Government and implemented by State Governments in accordance with the terms fixed by the Centre. Although the Planning Commission has ceased to exist, CSSs continue to form a significant channel of intergovernmental transfers. According to the Budget Estimates for 2021-22, up to 23 per cent of the total fiscal transfers to States are set to be through the route of CSSs.¹³ The Fifteenth Finance Commission has expressed concern over CSSs prevalent in health care and education, and the countervailing effect they have on Finance Commission-recommended grants that seek to address inter-State disparities and have an equalising focus.¹⁴

Concerns surrounding the uninhibited use of Article 282 to effectuate CSSs have persisted for several years now. As far back as 1971, the Report of the Centre-State Relations Inquiry Committee (the Rajamannar Committee

⁸ Report of the Fifteenth Finance Commission Report, *Finance Commission in COVID Times: Report for 2021-26* (Finance Commission, vol I, 2021) 369 <https://fincomindia.nic.in/writereaddata/html_en_files/fincom15/Reports/XVFC%20VOL%20I%20Main%20Report.pdf> accessed 24 April 2021 ('Fifteenth FC') 150.

⁹ The Constitution of India 1950, art 280.

¹⁰ Amaresh Bagchi, 'Role of Planning and the Planning Commission in the New Indian Economy: Case for a Review' (2007) 42 (44) *EPW* 92 ('Bagchi').

¹¹ Bagchi (n 10).

¹² Cabinet Secretariat Resolution (Planning) 1-P(C)/50, 'Government of India's Resolution setting up the Planning Commission' (March 1950) <<http://niti.gov.in/planningcommission.gov.in/docs/aboutus/history/PCresolution1950.pdf>> accessed 26 May 2021 ('Planning Commission Resolution').

¹³ Transfer of Resources to States and Union Territories with Legislature, Union Budget [2021-22] Ministry of Finance, Government of India, <www.indiabudget.gov.in/doc/Budget_at_Glance/bag3.pdf> accessed 21 April 2021. Data compiled from State Finance Accounts and Union Budget, 2018-19.

¹⁴ Fifteenth FC (n 8) 36.

Report) observed how grants under Article 282 are discretionary.¹⁵ In practical terms, the outstripping of Finance Commission grants by grants under Article 282 had placed the States in the position of supplicants for Central assistance.¹⁶ As recently as 2019, the Chairman of the Fifteenth Finance Commission voiced his discomfiture with the alleged misuse of Article 282. He argued that the provision was not meant to be an overarching route for effecting transfers, but an extraordinary one and to be sparingly used.¹⁷ Many attempts have been made to restructure and rationalise CSSs over the years, the most recent one being in 2015, when all existing CSSs were rationalised and clubbed together under 28 Umbrella Schemes.¹⁸ Despite such restructuring, confusion about the exact number of CSSs still persist.

A list drawn by the Department of Expenditure, Ministry of Finance, and cited by the Fifteenth Finance Commission confirmed the existence of 131 CSSs.¹⁹ On health alone, the Centre has initiated a number of flagship programmes,²⁰ such as the National Health Mission (through the Ministry of Health and Family Welfare), the Rashtriya Swasthya Bima Yojana (through the Ministry of Labour and Employment), and the Integrated Child Development Services (through the Ministry of Women and Child Development). Despite growing demands for rationalisation, especially after the recommendations of the Fifteenth Finance Commission, the Union's outlay toward CSSs has seen a sharp growth.²¹ With the introduction of Mission Shakti, Saksham Anganwadi and Poshan 2.0,²² Rashtriya Pashudhan Vikash Yojana, and the Prime Minister Atmanirbhar Swasth Bharat Yojana, the number of Umbrella CSSs has risen to 35 in the Financial Year 2021-22²³ which, by itself, takes the CSS tally beyond the Department of Expenditure's estimated 131. With the pandemic still far from over, concerns over erosion of fiscal federalism, underspending in healthcare, and lack of localised planning have become more amplified.

That CSSs dominate the space of intergovernmental transfers is a platitude. What requires urgent attention is the exact scope of the constitutional provision which has consistently been used to effectuate CSSs – Article 282. By using expenditure on healthcare as a starting point, this report takes a deep dive into Article 282, and the development of the practice of intergovernmental transfers. It analyses the architecture of fiscal federalism in India through a constitutional and jurisprudential lens. The commencement of the research is the drafting of the chapter on financial relations in the Constitution, after which, the report proceeds chronologically towards the implementation of provisions relating to intergovernmental transfers. The scheme of chapterisation of this report is as follows.

¹⁵ 'Report of the Centre State Relations Inquiry Committee, *Chapter V: Financial Relations* (Government of Tamil Nadu, 1971) 93, para 49 ('Rajamannar Committee Report').

¹⁶ Rajamannar Committee Report (n 15).

¹⁷ Speech of Shri N K Singh, Chairman, XV FC at the launch of the book 'Indian Fiscal Federalism' (Press Information Bureau, 28 March 2019) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1569807>> accessed 24 March 2021.

¹⁸ Based on the recommendation of the Sub-group of Chief Ministers on Rationalisation of Centrally Sponsored Schemes 2015, the Government of India rationalised the then existing CSSs into 28 umbrella schemes. See, Niti Aayog Office Memorandum No. O-11013/02/2015-CSS&CMC (17 August 2016) <https://niti.gov.in/writereaddata/files/new_initiatives/OM%20for%20circulating%20decision%20of%20the%20Cabinet%20on%20rationalisation%20of%20CSS.PDF> accessed 17 May 2021.

¹⁹ Bibek Debroy, 'A review of centrally sponsored schemes', *The New Indian Express* (19 February 2021) <www.newindianexpress.com/opinions/2021/feb/19/a-reviewof-centrally-sponsored-schemes-2265964.html> accessed 21 May 2021; It is, however, rather perplexing that the Chairman of the XV FC pegged the number of CSS at 211 schemes/ sub-schemes under the umbrella of 29 core schemes. See, N K Singh, 'Fiscal Federalism in India' in Junghun Kim and Sean Dougherty (eds), *Local Public Finance and Capacity Building in Asia: Issues and Challenges* (OECD Publishing 2020) <www.oecd-ilibrary.org/sites/940cc5ee-en/index.html?itemId=/content/component/940cc5ee-en> accessed 2 June 2021.

²⁰ The researchers came across 10 such CSS and Umbrella Schemes, which are listed on pages 21-22 of this report.

²¹ Dilasha Seth, 'Budget: Central Schemes Outlay sees rise despite talks of rationalisation', *Business Standard* (New Delhi 02 February 2021) <www.business-standard.com/budget/article/budget-central-schemes-outlay-sees-rise-despite-talks-of-rationalisation-121020200059_1.html> accessed 2 May 2021 ('Seth').

²² Ministry of Women and Child Development 'All Major Schemes of WCD Ministry classified under 3 Umbrella Schemes viz., Mission 2.0, Mission Vatsalya and Mission Shakti' (Press Information Bureau, 8 March 2021) <<https://pib.gov.in/PressReleaseSelfFramePage.aspx?PRID=1703147>> accessed 28 June 2021 ('Poshan 2.0').

²³ Seth (n 21).

B.Scheme of Chapterisation

This report is divided into the following Chapters:

Chapter II of this report undertakes a historical analysis of the founding documents of the Constitution of India, charting the journey from the Report of the Joint Committee on Indian Constitutional Reform, 1934 to the debates in the Constituent Assembly. The aim of this Chapter is to develop a holistic understanding of the fiscal federal architecture of the Constitution. This understanding becomes crucial to analyse the true and precise role intergovernmental transfers were expected to play in the scheme of fiscal relations between the Union and the States. At the same time, this Chapter also gleans over the purported role of the Finance Commission in effecting transfers, and the importance accorded to this body as an institutional mechanism established by and under the Constitution.

Following on from constitutional history, **Chapter III** of this report travels through the course of how the practice of intergovernmental transfers unfolded. A key aspect of this Chapter is a discussion of the institutions which remained at the forefront of transfers under both Articles 275 and 282. To that end, this Chapter begins with the emergence of the Planning Commission, proceeds to the proliferation of CSSs, and ends with examining certain aspects of CSSs that operate in the sphere of public health.

Having discussed how intergovernmental transfers operate as per Articles 275 and 282, **Chapter IV** analyses literature on the possible ways in which these constitutional provisions could have been interpreted. This Chapter relies heavily on legal opinions that were tendered during the term of the Ninth Finance Commission by eminent constitutional scholars on the exact interpretation of Articles 275 and 282. This Chapter also discusses *Bhim Singh v. Union of India*,²⁴ a case where the Supreme Court of India ventured into interpreting Article 282. The judgment in this case makes for interesting reading, especially for its characterisation of the Constitution as “quasi-federal”, and the subsequent use of this characterisation in interpreting Article 282.

Based on an analysis of the drafting of the Constitution, the practical underpinnings of intergovernmental transfers, and a potential understanding of Article 282, **Chapter V** of this report recommends a way forward. This Chapter encompasses an overview of pronouncements of the Supreme Court which are either premised on or comprise a discussion of ‘federalism’ or the ‘federal character’ of the Constitution of India. The judgments cited in this Chapter employ ‘federalism’ as a tool for interpretation. Based on an analysis of these judgments, Chapter V recommends how CSSs can be crafted in a manner which furthers federalism and autonomy of States. Devising of CSSs in such a manner can, potentially, lead to an interpretation of Article 282 which is more holistic and harmonious with the Constitution’s overall federal structure, and especially its fiscal federal architecture. **Chapter VI** concludes the report.

²⁴ *Bhim Singh v Union of India*, (2010) 5 SCC 538.

II. How did the fiscal federal architecture of the Constitution come to be?

Renowned historian Granville Austin has argued that the provisions of the Indian Constitution for the distribution of revenues flew “directly in the face of the classical federal tradition.”²⁵ Austin described the Constituent Assembly’s approach to framing the financial provisions as an exemplification of what A H Birch describes as “cooperative federalism.”²⁶ The drafters of the Constitution acknowledged the importance of independent sources of revenue for the Union and the provinces for seamless functioning of a federal government. This was accompanied by the observation that the Union government, in several federations, acts as the taxing agency responsible for sharing the proceeds of such taxes with the units/provinces.²⁷

The members of the Assembly, and particularly, the representatives of the provinces, were acutely aware of the fact that under the scheme of financial relations contemplated under the Draft Constitution,²⁸ provincial tax heads would produce insufficient incomes for meeting provinces’ expenditures. Even then, while making strong claims for increased funds, provincial representatives did not suggest that taxes previously (or traditionally) within the Union’s domain be placed within the legislative competence of the provinces. The discussion around the need for increased funds hinged on the manner of distribution of proceeds to the provinces – the aim was to achieve a system that was seamless and avoided friction between the two tiers of government. It is against this background that the idea of having an independent body, which ultimately came to be known as the Finance Commission, was floated. Austin remarks that this willingness of the framers of the Indian Constitution to leave adjustments in the distribution of revenues to “post-constitutional commissions” can be contrasted from certain other federations where mutual distrust led to entrenchment of the respective shares of the centre and the units within the constitutional text.²⁹

The outcome of the drafting process yielded constitutionally demarcated spheres of fiscal powers for the Union and the State Governments.³⁰ This Chapter will analyse the discussions that preceded the drafting of the chapter on financial relations (between the Union and State Governments) under the Constitution. As this Chapter will reveal, Article 282 (which is the subject of this report), did not witness intense scrutiny. Nonetheless, a holistic analysis of the chapter on financial relations can yield crucial insights into the intention of the drafters, and how they wanted the system of intergovernmental transfers to operate. To that end, this Chapter will proceed chronologically in its analysis, starting from the Report of the Joint Committee on Indian Constitutional Reform (Joint Committee Report/ JCR)³¹ and culminating with the provisions of the Constitution as they finally came to be.

²⁵ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 2014) 270 ('Austin').

²⁶ Austin (n 25) 270.

²⁷ This observation was made by Shri Alladi Krishnaswamy Aiyar in the Constituent Assembly. See, *Constituent Assembly of India Debates*, vol 7, 8 November 1948 <<http://loksabha.nic.in/writereaddata/cadebatefiles/C08111948.html>> accessed 25 June 2021.

²⁸ On what is referred to as the “Draft Constitution”, see *Draft Constitution of India, 1948* (ConstitutionOfIndia.Net) <www.constitutionofindia.net/historical_constitutions/draft_constitution_of_india__1948_21st%20February%201948> accessed 25 June 2021.

²⁹ Austin (n 25) 272.

³⁰ This demarcation has led to India being described as a “fiscal federation” by certain authors. See, Indira Rajaraman, ‘The Political Economy of the Indian Fiscal Federation’ (2007-08) 4(1) *India Policy Forum, National Council for Applied Economic Research* 1,1 <www.ncaer.org/image/userfiles/file/Indira%20Rajaraman.pdf> accessed 25 June 2021.

³¹ Joint Committee on Indian Constitutional Reform, *Report, Volume I, Part I* (Session 1933-34) 161 ('JCR').

A. Drafting of the financial provisions – The journey

1. Financial provisions and the Constituent Assembly - The general aspects

The JCR that preceded the enactment of the Government of India Act, 1935 (GoI Act 1935) gives crucial insights into the factors that informed the scheme of financial relations between the Union and the provinces. The Committee took note of the constitutional problem they were faced with – that two different authorities (the Government of the Federation and Governments of the Units (the provinces)) – were to raise money from the same body of taxpayers.³² One way of simplifying this problem was to allocate separate fields of taxation to the two authorities. However, the revenues accrued from such a division, as far as practicable, would not fit the economic and financial requirements of each party.³³ This particularly held true for the provinces which, as per the Report, had “*an almost inexhaustible field for the development of social services*”, while the demands upon the Centre were “*more constant in character*.”³⁴

While mulling the need for increased funds for the State, the JCR categorically noted that the system of “doles” from the Centre to the Provinces, and shared heads of revenue caused inconveniences. Consequently, the authors of the GoI Act 1935 (and, eventually, the authors of the Constitution) adopted an almost completely rigid separation of the sources of revenue assigned respectively to the two tiers of government.³⁵

The financial provisions, as they currently stand in the Constitution, are based largely on the GoI Act 1935. In November 1947, the Constituent Assembly appointed an ‘Expert Committee on Financial Provisions of the Union Constitution’ (Expert Committee) to examine the provisions on financial matters in the GoI Act 1935, and to make recommendations on the financial provisions to be embodied in the Constitution.³⁶ One of the reasons for constituting the Expert Committee was to ensure representation of viewpoints from the provinces in drafting the financial provisions of the Constitution.³⁷ The Expert Committee began its work on 17 November 1947 and submitted its report to the President of the Constituent Assembly on 5 December 1947; its report was placed on the table of the Assembly on 4 November 1948. The current framework of constitutional provisions relating to fiscal federalism in India bears resemblance to the recommendations proposed by the Expert Committee.

The terms of reference for the Expert Committee covered almost every aspect concerning financial relations between the Union and the provinces, including principles for levying taxes and sharing their proceeds. Notable among these terms was the following:

*“What should be the principles on which federal grants should be made to the units in future? What should be the machinery for the determination of such grants: should the Financial Commission act as the machinery for this purpose also, or should it be a different one?”*³⁸

³² JCR (n 31) 160, para 244.

³³ JCR (n 31) 160, para 244.

³⁴ JCR (n 31) 160-161.

³⁵ JCR (n 31) 160 para 245.

³⁶ Report of the Expert Committee on Financial Provisions, December 5, 1947 in *The Framing of India's Constitution: Select Documents Vol 3* (B Shiva Rao ed, New Delhi: Universal Law Publishing, 2012) 255-312 (‘Expert Committee Report’).

³⁷ Austin (n 25) 282.

³⁸ Expert Committee Report (n 36) 261.

While discussing their respective expenditures, the Expert Committee was amply clear about the myriad needs of the States pertaining to welfare and development, as opposed to the relatively more static needs of the Centre. One pertinent observation made by the Report is as follows:

*“The basic functions of a Federal Government are Defence, Foreign Affairs and the service of the bulk of national debt, and they are all expensive functions, particularly in light of the limited resources of the country.... The needs of the provinces are in contrast almost unlimited, particularly in relation to welfare services and development. If these services, on which the improvement of human well-being and increase of the country's productive capacity so much depend, are to be properly planned and executed, it is necessary to place at the disposal of Provincial Governments adequate resources of their own, without their having to depend on the variable munificence and affluence of the Centre....”*³⁹

Despite acknowledging the need for adequate resources for provinces, the Expert Committee did not recommend adding to the areas in which provinces could levy taxes. The institutional recommendations of the Expert Committee embodied an arrangement regarding the division of the tax bases between the Union and the provinces besides specifying the distribution of proceeds of taxes under the Constitution.⁴⁰ The Committee also remained cognizant of how some provinces would require a stronger financial boost as compared to others, based on their existing financial capabilities. In fact, reducing the disparities between provinces weighed heavily on the Expert Committee while discussing the question of grants. The Committee noted that *“during the developmental stages of the country it will be necessary for the Centre to make specific purpose grants to the provinces from time to time.”*⁴¹ In the backdrop of that observation, the Expert Committee also recommended larger fixed subventions for certain provinces (namely, Assam and Orissa) and subventions for limited periods for East Punjab and West Bengal. As mentioned above, even while these fixed subventions were being recommended, the Committee remained cognizant of the fact that provinces cannot remain dependent on the affluence of the Centre.⁴²

The recommendations made by the Expert Committee were aimed at ensuring a system that could be implemented automatically, without any friction or mutual interference between the two tiers of government.⁴³ To undertake a periodic review of the working of the fiscal scheme, the Committee recommended the appointment of a “high level tribunal”⁴⁴ called the Finance Commission. The functions envisaged for the Commission included the allocation between the provinces of their shares of centrally administered taxes assigned to them, and consideration of applications for grants-in-aid for provinces.⁴⁵ The Committee is understood to have staunchly supported substantial autonomy for the provinces to decide questions pertaining to expenditure.⁴⁶ This aspiration for autonomy can be said to have manifested in certain specific recommendations, one of which is where the Expert Committee put down the specifics of the financial sources of the Centre and the provinces.

In the Drafting Committee of the Constituent Assembly, even though there were certain individual voices of criticism of certain recommendations made by the Expert Committee Report,⁴⁷ the point it made with respect to

³⁹ Expert Committee Report (n 36) 268.

⁴⁰ T N Srinivasan and Jessica Seddon Wallack, ‘Inelastic Institutions: Political Change and Intergovernmental Transfer Oversight in Post-Independence India’ (2011) 7(1) *India Policy Forum, National Council for Applied Economic Research* 203, 211 <https://www.ncaer.org/image/userfiles/file/IPF-Volumes/Volume%207/5_T%20N%20Srinivasan_Jessica%20Seddon%20Wallack.pdf> accessed 25 June 2021 (‘Srinivasan and Wallack’).

⁴¹ Expert Committee Report (n 36) 273-274.

⁴² Expert Committee Report (n 36) 268.

⁴³ Expert Committee Report (n 36) 287-298. See also, Srinivasan and Wallack (n 40) 211.

⁴⁴ Expert Committee Report (n 36) 278.

⁴⁵ Expert Committee Report (n 36) 288.

⁴⁶ Srinivasan and Wallack (n 40) 210.

⁴⁷ For instance, on the issue of allocation of proceeds of income tax between the Centre and the provinces, Shri Biswanath Das pointed out that the Committee committed a “blunder” by recommending only 60% for the provinces and 40% for the Centre, given that provinces *are in charge practically of all the nation-building activities of the country*. See, *Constituent Assembly of India Debates*, vol 9, 5 August 1949 <<http://loksabha.nic.in/writereaddata/cadebatefiles/C05081949.html>> accessed 25 June 2021.

provincial autonomy and expenditure responsibilities was well-received. The recommendation alluding to the need for a body like the Finance Commission was also viewed favourably. In sum, the recommendations of the Expert Committee were accepted with minimal modifications.

2. Grants and grants-in-aid – The specifics

What does deserve specific mention here is the discussion on the aspect of assistance from the Union to the provinces in the form of grants. Grants, as understood broadly, were to be made by the Union to the provinces with an avowed purpose – that of compensating for and correcting regional disparities, promoting social welfare schemes that provinces would undertake, and seeking a fine balance between the provinces' resources and their developmental needs.

This fact is also exemplified in the Constituent Assembly Debates on draft Article 255 (which finally became Article 275 of the Constitution). Provincial representatives mulled specific grants for themselves, such as when Syed Muhammed Sa'adulla spoke of the peculiar financial requirements for Assam given its topography and geography.⁴⁸ Similar requirements were also cited for Orissa (as it was then called) by Shri Biswanath Das.⁴⁹

This is not to say that deliberations around draft Article 255 remained bereft of anything contentious. Vesting Parliament with the power to determine grants to provinces came under scrutiny by some of the members. Rev. J.J.M. Nichols Roy brought to the Assembly's notice that because all distributions to the provinces as grants-in-aid will have to pass through Parliament, an inordinate amount of time would be spent in determining what sums would be paid to a certain province.⁵⁰ Besides, the process would inevitably "*cause wrangling among Provinces*" as each province would "*try to pull strings as hard as possible to get as much share as possible for itself*."

Coupled with this was the concern regarding adequate representation before the Parliament of certain provinces. Shri Biswanath Das pointed towards a pressing concern among the underdeveloped provinces that the Government of India may become more autocratic and may deprive the provinces of the small grants-in-aid that were prevailing at the time of the drafting of the Constitution.⁵¹ Shri Brajeshwar Prasad, representing Bihar, expressed this issue in the following words:

*"....there is apprehension in our minds that the majority of the members belonging to one particular province may tilt the balance against the interests of the minority provinces or deficit provinces without paying any regard or having any consideration of the interests and the needs of the deficit provinces...."*⁵²

The proposed means to assuage this concern were two-fold – *first*, an amendment to draft Article 255 which would make it possible for the President to render help to provinces in immediate need, until provision is made by Parliament⁵³ and *second*, immediate appointment of the Finance Commission which could determine the principles based on which grants and grants-in-aid to provinces would be made.

On 9 August 1949, when Article 255 was adopted, the Assembly accepted the amendment which facilitated the President to exercise his powers of making grants under Article 255 even before the Parliament had made any

⁴⁸ *Constituent Assembly of India Debates*, vol 9, 8 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C08081949.html>> accessed 25 June 2021.

⁴⁹ *Constituent Assembly of India Debates*, vol 9, 8 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C08081949.html>> accessed 25 June 2021.

⁵⁰ *Constituent Assembly of India Debates*, vol 9, 8 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C08081949.html>> accessed 25 June 2021.

⁵¹ *Constituent Assembly of India Debates*, vol 9, 9 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C09081949.html>> accessed 25 June 2021.

⁵² *Constituent Assembly of India Debates*, vol 9, 9 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C09081949.html>> accessed 25 June 2021.

⁵³ This amendment was initially proposed by Rev JJM Nichols Roy, and subsequently endorsed by several other members, such as Shri Brajeshwar Prasad and Shri Naziruddin Ahmad.

determination of this matter.⁵⁴ In the discussions that took place on draft Article 260 (which was finally adopted as Article 280), it was decided that a Finance Commission would be constituted within two years from the commencement of the Constitution.⁵⁵

The other provision which dealt with grants was Article 262 of the Draft Constitution, which is the present-day Article 282. Article 262, as presented before the Assembly, read thus:

“262. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.”

This provision was almost identical to Section 150(2) of the GoI Act 1935, with one modification. Section 150(2) provided that *“the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws.”* Article 262 was adopted with the words “public purpose”, instead of merely “purpose.” Not much can be deciphered about the intention of the Constituent Assembly for prefixing the term “purpose” with “public”, primarily because Article 282 was adopted on 10 August 1949 without much debate.⁵⁶ There is a separate reference to Article 262 in a debate on 31 August 1949 (on a different provision⁵⁷), where Dr BR Ambedkar is quoted as saying that Article 262 has a much wider scope, compared to Article 255, given that under Article 262, Parliament is free to make a grant on subjects outside of List I (Union List).⁵⁸ It must be mentioned, however, that this was not a detailed conceptual discussion on draft Article 262 and did not merit a deep dive into the institutional specifics of how such grants would be made.

Broadly, however, the question of grants did not witness vehement debate in the Constituent Assembly. Discussions with respect to setting up of the Finance Commission were also, primarily, centered around the finality of its recommendations, and the ideal point in time for establishing it.⁵⁹ The absence of intense debate in the Assembly on the constitutional provisions on grants and grants-in-aid, as pointed out by Austin, spoke for itself:

“.... There can be little doubt that the Assembly expected that the use of grants and grants-in-aid would follow the lines eventually recommended by the Finance Commissions, for neither of the articles of the Draft caused much discussion at the July 1949 meeting of the Drafting Committee and provincial ministers, and the Assembly adopted the provisions with equally little debate. In fact, the opposite was true: instead of evincing suspicion of the grants procedure, at least five provinces made specific pleas for special subventions for social and economic development. There is no evidence that the provincial governments or their representatives in the Assembly feared that the Union Government would try to reduce their independence by means of the mechanism for making grants.”⁶⁰

⁵⁴ *Constituent Assembly of India Debates*, vol 9, 9 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C09081949.html>> accessed 25 June 2021.

⁵⁵ *Constituent Assembly of India Debates*, vol 9, 10 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C10081949.html>> accessed 25 June 2021.

⁵⁶ *Constituent Assembly of India Debates*, vol 9, 8 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C08081949.html>> accessed 25 June 2021.

⁵⁷ Article 262 was referenced on 31 August 1949 in a debate on draft Entry 57A which read thus: “57(A): Co-ordination and maintenance of standards in institutions for higher education, scientific and technical institutions and institutions for research.” See, *Constituent Assembly of India Debates*, vol 9, 31 August 1949 <<http://loksabhaph.nic.in/Debates/cadebatefiles/C31081949.html>> accessed 25 June 2021.

⁵⁸ *Constituent Assembly of India Debates*, vol 9, 31 August 1949 <<http://loksabhaph.nic.in/Debates/cadebatefiles/C31081949.html>> accessed 25 June 2021.

⁵⁹ *Constituent Assembly of India Debates*, vol 9, 8 August 1949 <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C08081949.html>> accessed 25 June 2021.

⁶⁰ Austin (n 25) 290.

B. Conclusion and Key Takeaways

Overall, discussions in the Constituent Assembly indicate that the principles and processes central to intergovernmental transfers did not evince suspicion among the representatives of the provinces. This must have been, in part, attributable to the sentiment prevalent in the Expert Committee with respect to grants - that provinces needed to be facilitated with independent funds of their own so as to not remain dependent on the Centre for their developmental needs. Furthermore, the Finance Commission was envisaged to be an impartial institution, which would formulate the principles based on which grants would be made from the Union to the provinces. The importance accorded to the Finance Commission as an institution which would facilitate seamlessness in the manner of making grants cannot be understated. *Prima facie*, the Constituent Assembly did not envisage any difference in the institutional mechanisms which were to facilitate grants under Article 275 and Article 280.

In light of the constitutional scheme, as it came to be, the next Chapter discusses the practice of grants under Article 282 of the Constitution.

Key Takeaways

Discussions around intergovernmental transfers oversaw specific demands being raised by certain provinces for financial assistance from the Union. Overall, there was no suspicion on the part of the provinces that such support would come at the cost of their autonomy.

The Finance Commission was envisaged to be an independent and impartial constitutional body, that would ensure seamless intergovernmental transfers of grants and grants-in-aid.

Article 282 was not the subject of intense deliberation. Prima facie, a separate institutional mechanism for facilitating transfers under Article 282 was never discussed/ envisaged.

III. How did Article 282 come to be used?

After the coming into force of the Constitution, the practice of intergovernmental transfers under Articles 275 and 282 spanned primarily across two institutions - the Finance Commission which remained crucial for effecting transfers via Article 275, and the Planning Commission which recommended grants routed via Article 282. This Chapter attempts to chart a succinct factual description of the system of grants that developed under the institutional system of the Planning Commission and the National Development Council (NDC). This description will take the reader through how Article 282 came to be utilised, as a matter of practice, to channel grants through CSSs.

It was only a matter of time before the routing of funds through CSSs came under the scanner by scholars interested in constitutional law and public finance. As early as 1966, a mere 16 years after the coming into force of the Constitution, a Study Group of the First Administrative Reforms addressed several aspects associated with the evolution of Article 282. Thereafter, several studies commissioned by governments have addressed similar concerns. While discussing the recommendations made under these studies, this Chapter discusses the imbalance created in the fiscal federal architecture by CSSs in general, and CSSs operating in the sphere of public health in particular.

A. Emergence of the Planning Commission

India emerged as a federal polity after Independence. The Constitution specified the financial and functional domain of the Union and the States through the Seventh Schedule. However, as mentioned earlier, the Indian federal architecture resulted in a vertical fiscal imbalance between the Union and the States as well as horizontal fiscal imbalance among the States themselves.⁶¹ The Constitution enshrined a model crafting interdependence between the Union and the States to enable different levels of government to coordinate to resolve issues of national importance and achieve social and economic progress. However, in the early 1950s, soon after India's Independence, issues in Centre-State coordination began to emerge. Prime Minister Jawaharlal Nehru was concerned about the apparent constraints on the Central Government to further socio-economic development in a welfare state,⁶² as major developmental subjects and sectors fell within the competence of the States. His concerns are well reflected in his letters to the Chief Ministers in August 1950 where he writes that the Central Government '*is in the unenviable position of responsibility for everything without power to do much*'.⁶³ Driven by this sentiment, in February 1950, the intention of constituting a Planning Commission was announced.⁶⁴ The Commission was eventually established as an advisory body on 15 March 1950 through a Cabinet Resolution.⁶⁵ This post-Independence Planning Commission under the Central Government was a descendant of the 1938 National Planning Committee set up by Subhash Chandra Bose on the suggestion of Meghnad Saha, with economist K T Shah as its head.⁶⁶

⁶¹ M Govinda Rao, 'Fiscal Decentralization in Indian Federalism' (Conference on Fiscal Decentralization, International Monetary Fund, Washington D C, November 2000) <www.imf.org/external/pubs/ft/seminar/2000/fiscal/rao.pdf> accessed 25 June 2021.

⁶² Louise Tillin, *Oxford India Short Introduction: Indian Federalism* (Oxford University Press 2019).

⁶³ Madhav Khosla (ed), *Letters for a Nation From Jawaharlal Nehru to his Chief Ministers 1947-1963* (Penguin Books Limited 2015) 156.

⁶⁴ Y V Reddy and G R Reddy, *Indian Fiscal Federalism* (Oxford University Press 2019) 12 ('Reddy and Reddy').

⁶⁵ Planning Commission Resolution (n 12).

⁶⁶ Prabhat Patnaik, 'From the Planning Commission to the NITI Aayog' (2015) 50 (4) *Economic and Political Weekly* <www.epw.in/journal/2015/4/commentary/planning-commission-niti-aayog.html> accessed 24 April 2021.

The Prime Minister was the ex-officio Chairperson of the Planning Commission.⁶⁷ The other members of the Commission were either Cabinet Ministers or experts appointed by the Prime Minister, making its membership coterminous with the term of the Prime Minister.⁶⁸ Effectively, this established the Commission as a unit of the Central Government wherein the membership corresponded with the political cycles.⁶⁹

The Planning Commission was aimed to enhance the Central Government's capacity to plan and coordinate social and economic development at the national level. The Planning Commission was constituted '*to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country, increasing production and offering opportunities to all for employment in the service of the community*.'⁷⁰ It was charged with the responsibility of making assessment of all resources of the country, augmenting deficient resources, and formulating plans for the most effective and balanced utilisation of resources and determining priorities, etc.'⁷¹ The Planning Commission, set up to dispense 'plan assistance' to the States, coexisted with the Finance Commission which was constituted every five years by the President under Article 280 of the Constitution and the Finance Commission (Miscellaneous Provisions) Act, 1951.⁷² Among its other functions under clause (3) of Article 280, the Finance Commission recommends tax devolution and grants-in aid of revenues.

Soon after the establishment of the Planning Commission, the NDC was established in 1952, under another Cabinet Resolution, on account of the Planning Commission's recommendation made in the draft outline of the First Five-Year Plan.⁷³ The NDC was meant to be a forum for close cooperation between the Centre and the State Governments for national development. The Planning Commission was expected to function under the guidance of the NDC which happened to be the apex body for decision-making and deliberations on development matters. The NDC was presided over by the Prime Minister and consisted of the Deputy Chairman and Members of the Planning Commission, Union Cabinet Ministers, Chief Ministers of the States, and Administrators of Union Territories.⁷⁴ With representation from both the Union and the States, the NDC, thus, became a platform for Centre-State collaboration. The functions of the NDC related to formulation of the national plan and reviewing its working, reconsidering the national plan formulated by the Planning Commission, and considering important questions of social and economic policy affecting national development.⁷⁵

The Planning Commission was tasked with giving recommendations on the magnitude of grants and loans to be provided to the States for financing their expenditure on targeted interventions for socio-economic development.⁷⁶ One of the functions of the Planning Commission was to approve the Plan of each State and allocate transfers of funds from Union to States, both untied and tied to activities or schemes under the Plan.⁷⁷ It is crucial to mention that these transfers were in addition to the transfers which were made on the recommendations of the Finance Commission and Union Ministries, which collectively came to be known as 'non-Plan transfers'.

⁶⁷ Reddy and Reddy (n 64) 13.

⁶⁸ Reddy and Reddy (n 64) 13.

⁶⁹ Reddy and Reddy (n 64) 13.

⁷⁰ Planning Commission Resolution (n 12).

⁷¹ Planning Commission, Government of India <<https://niti.gov.in/planningcommission.gov.in/docs/aboutus/history/index.php?about=aboutbdy.htm>> accessed 3 April 2021. See also, Planning Commission Resolution (n 19).

⁷² The Finance Commission (Miscellaneous Provisions) Act, 1951 is an Act to determine the qualifications requisite for appointment as members of the Finance Commission and the manner in which they shall be selected.

⁷³ Reddy and Reddy (n 64) 13.

⁷⁴ Reddy and Reddy (n 64) 13.

⁷⁵ Summary record of the discussions of the National Development Council (NDC) Meetings, Volume 1 (Planning Commission, Government of India) <https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/50NDCs/vol1_1to14.pdf> accessed 4 April 2021.

⁷⁶ Reddy and Reddy (n 64) 13-14.

⁷⁷ Reddy and Reddy (n 64) 13-14.

The volume and components of the grant loans to States (under Plan assistance) was initially decided on the basis of the projects approved. However, in 1969, while responding to demands made by several States, the NDC adopted a formula for calculating Plan grants which were meant for the States. The formula was evolved by the then Deputy Chairman of the Planning Commission D R Gadgil, and came to be known as the 'Gadgil Formula'.⁷⁸ Under Pranab Mukherjee's Deputy Chairmanship, the formula was revised in 1991, and was rechristened as the 'Gadgil Mukherjee Formula'.⁷⁹ This formula remained in operation till 2014-2015.⁸⁰ Effectively, Plan assistance consisted of formalised (normal Plan assistance) and scheme-based transfers.⁸¹

Between 1950 to 2014, the Planning Commission advised the Central Government in regard to the Plan grants which were to be made to the States.⁸² The Planning Commission formulated and agreed on National and State Five-Year Plans. These were centralised and integrated national economic programmes devised by the Planning Commission under the supervision of the NDC. The Five-Year Plans were a formal model of planning adopted for an effective and balanced utilisation of resources. Between 1950 and 2014, the Planning Commission formulated twelve Five-Year Plans.

The government budget comprises receipts and expenditures. While the government receipts are classified into revenue receipts and capital receipts, the government expenditure in India was broadly divided across these categories – either as **revenue expenditure and capital expenditure**⁸³ or as **Plan expenditure and Non-Plan expenditure**.⁸⁴ The Plan expenditure referred to all kinds of government expenditure on capital heads, such as school buildings, hospital buildings, roads and bridges as well as those on revenue heads, such as salaries of staff, wages of workers, textbooks, and medicines, that were incurred on the programmes laid out in the ongoing Five-Year Plan.⁸⁵ The Non-Plan expenditure, on the other hand, referred to all kinds of government expenditure that was outside the purview of the Five-Year Plans. This included expenditure under heads such as defence services, interest payments, expenditure on government organs and departments, salaries etc.⁸⁶ Till 2013, Plan expenditure, which was meant for development purposes, constituted one-third of public expenditure; non-Plan expenditure, which amounted to two-thirds of public expenditure in India, catered to both development and non-development sectors.⁸⁷

Plan expenditures encompassed the Central Government outlay on developmental schemes and programmes which were financed out of the Gross Budgetary Support (GBS). Broadly, Plan expenditure was classified into the

⁷⁸ Under the Gadgil Formula, the requirements of Assam, Jammu and Kashmir, and Nagaland were to be first met out of the total pool of Central assistance, and the balance of the Central assistance was to be distributed on the basis of: 60 percent (population), 10 percent (per capita income of the States below national average), 10 percent (tax effort), 10 percent (spillover outlays into the Fourth Five-year plan of major irrigation and power schemes), and 10 percent (special problems of individual States); See, Reddy and Reddy (n 64) 11.

⁷⁹ Under the Gadgil-Mukherjee formula, Central assistance was to be distributed on the basis of: 60 percent (population), 25 percent (per capita GSDP: 20 percent for States below the national average and 5 percent for all States), 7.5 percent (performance: 2.5 percent for tax policy, 2 percent for fiscal management and 3 percent for national objectives), 7.5 percent (special problems); See Reddy and Reddy (n 64) 11-12.

⁸⁰ Reddy and Reddy (n 64) 197.

⁸¹ Reddy and Reddy (n 64) 11.

⁸² Nirvikar Singh, 'Fiscal Federalism' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) ('Nirvikar Singh').

⁸³ Ministry of Finance, Report of the Expert Group Constituted to review the Classification System for Government Transactions (*Government of India*, July 2004) <www.finmin.nic.in/sites/default/files/ReportExpGrGovTrans.pdf> accessed 29 March 2021.

⁸⁴ The Indian Constitution provides for the separation of expenditure into revenue and capital through Articles 112(2) and 202. The classification of total expenditure into Plan and Non-Plan has, however, evolved with the planning process; See, N Aparna Raja, 'Expenditure Pattern of the Central Government' (*Clearing Corporation of India Limited* 2013) <www.ccilindia.com/Documents/Rakshitra/2013/aug/Article.pdf> accessed 12 June 2021.

⁸⁵ Subrat Das and Sona Mitra, 'Restructuring Centrally Sponsored Schemes: A Brief Note on the Recent Policy Measures' (*Centre for Budget and Governance Accountability* 2013) <www.cbgaindia.org/wp-content/uploads/2016/03/CSS-briefing-Paper.pdf> accessed 8 March 2021 ('Das and Mitra').

⁸⁶ Das and Mitra (n 85).

⁸⁷ Das and Mitra (n 85).

following - the Central Plan and the Central Assistance to State Plan.⁸⁸ The Central Assistance to State Plan further comprised the following:

- CSSs, and
- Block grants which included Normal Central Assistance (NCA), Additional Central Assistance (ACA), One Time Additional Central Assistance, Special Central Assistance (SCA), and Special Plan Assistance (SPA).⁸⁹

The above-mentioned division of budget heads continued till 2017.⁹⁰ A diagrammatic representation of the said budget heads is as follows:

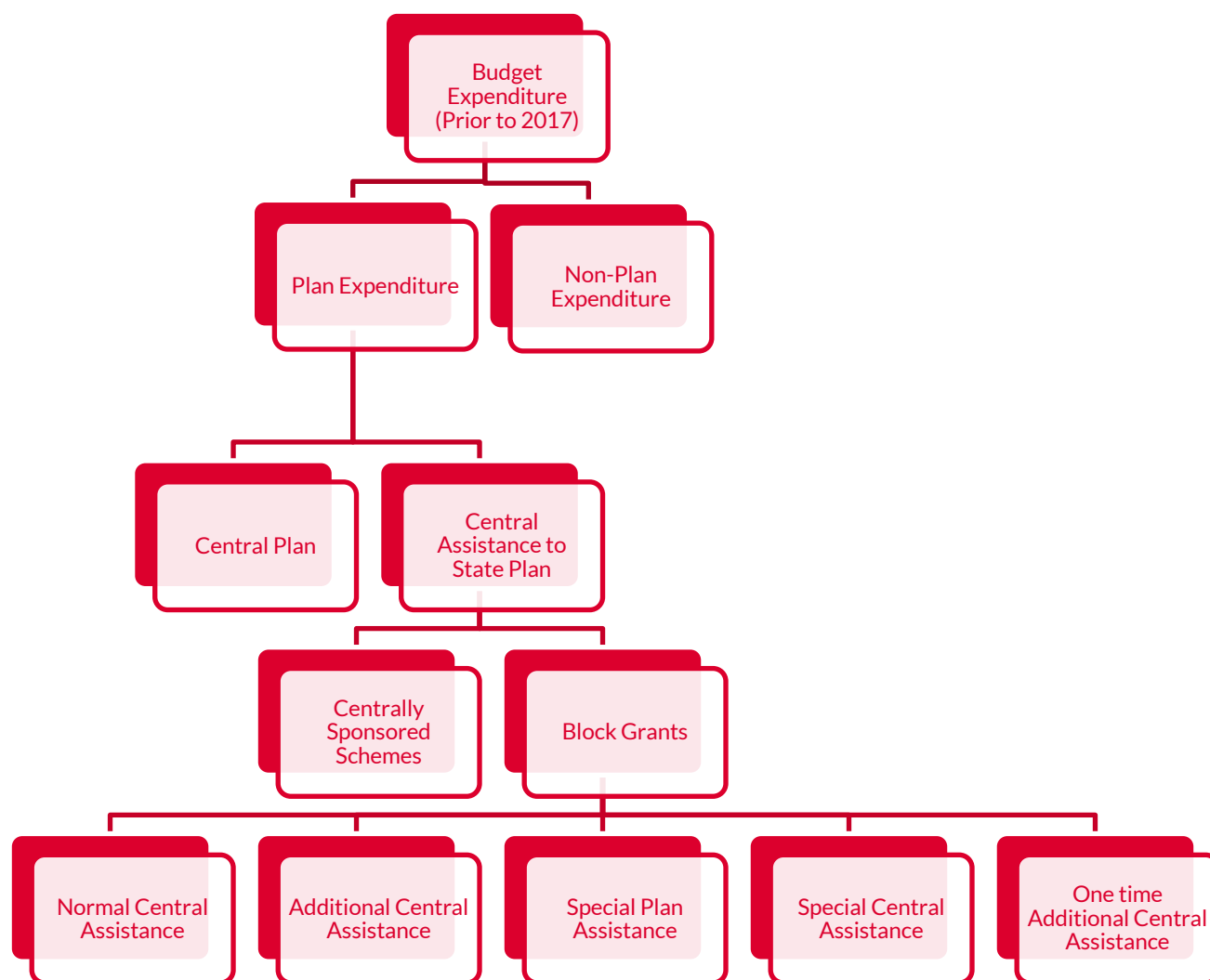


Figure I

⁸⁸ Sindhushree Khullar, Divya Satija, and Kumar Abhishek, 'Development Expenditure in the States post Fourteenth Finance Commission Award: An Assessment of the Centrally Sponsored Schemes' (Indian Council for Research on International Economic Relations 2018) <https://fincomindia.nic.in/writereaddata/html_en_files/fincom15/StudyReports/Development%20Expenditure%20in%20the%20States%20post%20FFC%20award_An%20assessment%20of%20the%20Centrally%20Sponsored%20schemes.pdf> accessed 24 April 2021 ('Khullar, Satija and Kumar').

⁸⁹ Khullar, Satija and Kumar (n 88).

⁹⁰ The Rangarajan Committee set up by the Planning Commission in its report titled 'Report of the High-Level Expert Committee on Efficient Management of Public Expenditure' (July 2011), recommended the ending of Plan and Non-Plan distinction which was implemented with effect from Financial Year 2017-18. See, Report of the High-Level Expert Committee on Efficient Management of Public Expenditure (Planning Commission, Government of India, July 2011) < https://pfmkin.org/sites/default/files/2020-02/Report%20of%20High%20Level%20Committee%20on%20Efficient%20Mgt%20of%20Public%20Expenditure%202011_0.pdf> accessed 25 June 2021.

B. Dissolution of the Planning Commission and Restructuring of CSSs

In 2015, Prime Minister Narendra Modi dissolved the Planning Commission as well as the NDC. As of 1 January 2015, the Planning Commission and the NDC were subsumed within the National Institution for Transforming India Aayog (NITI Aayog). The NITI Aayog is also a non-statutory body, which is headed by the Prime Minister.⁹¹ With this, the practice of devising Five-Year Plans was also discontinued, with the last one corresponding to the period between 2012-2017. Simultaneously, normal Plan assistance also ceased to operate. Block grants were also discontinued from 2015-16 and were included within the increased devolution to States, pursuant to the recommendations of the Fourteenth Finance Commission.⁹² The Fourteenth Finance Commission covered the entire revenue account requirements of the States, both Plan and non-Plan, in its recommendations.⁹³ With the end of the Twelfth Five-Year Plan period, the practice of classifying Central expenditure as Plan and non-Plan expenditure introduced by the First Five-Year Plan in 1951, was discontinued. The Union Budget of 2017 classified budget heads into the following:

- Central Expenditure, and
- Transfers to States under Revenue and Capital.⁹⁴

The Central Expenditure is further classified into Establishment Expenditure (includes all the establishment-related expenditure of the Ministries or Departments, attached and subordinate offices), Central Sector Schemes/Projects (includes all Schemes that are entirely funded and implemented by the Central Agencies), and Other Central Expenditure (expenditure not covered in the above two heads). On the other hand, the Transfer to States is further classified into CSSs, Finance Commission Transfers, and Other Transfers.⁹⁵

A diagrammatic representation of the budget heads, as prevalent after 2017, follows:

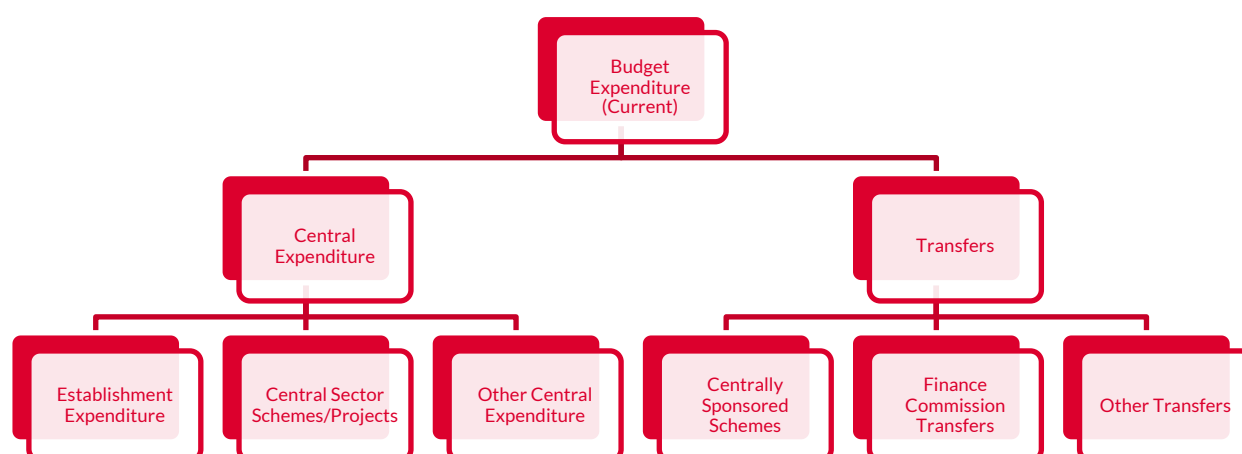


Figure II

Although the Planning Commission advised the Union and State governments on several matters of fiscal federal importance, the most significant of these related to transfers effected by the Union government to the States,

⁹¹ Planning Commission Resolution (n 12).

⁹² Khullar, Satija and Kumar (n 88)

⁹³ M Govinda Rao, 'Central Transfers to States in India Rewarding Performance While Ensuring Equity' (NITI Aayog 2017) <www.niti.gov.in/writereaddata/files/document_publication/Final%20Report_25Sept_2017.pdf> accessed 22 June 2021 ('Govinda Rao').

⁹⁴ Khullar, Satija and Kumar (n 88).

⁹⁵ Khullar, Satija and Kumar (n 88).

particularly those which fell outside the purview of Finance Commission Transfers. These Transfers were primarily of two kinds - *untied grants* in terms of Central Assistance to State Plans, and *tied grants* with respect to specific activities or schemes, including CSSs.⁹⁶ Despite being an extra-Constitutional body, the Planning Commission recommended a large number of CSSs which were implemented via grants routed through Article 282. After the dissolution of the Planning Commission, transfers under CSSs are made and effected by concerned Central Ministries.⁹⁷

The evolving practice of grants under Article 282 makes for a story worth narrating. It is rather intriguing that grants channeled via Article 282 became a pain point soon after the Constitution came into force, as is evident from the observations made by the First Administrative Reforms Commission (ARC). The Thirteenth Report of the First ARC noted that “*when the Constitution was framed, recourse to that Article for the purpose of making grants for the Five-Year Plan schemes could not have been contemplated.*”⁹⁸ The ARC rued the absence of principles governing the allocation of Plan grants, and noted that the Planning Commission did not apply various criteria in determining the grants made to States.⁹⁹ CSSs, the prevailing instruments for making such grants, routinely touch upon subjects that strictly fall within the legislative and administrative competence of the State governments. Needless to mention, CSSs have been the source of unavoidable tension in the federal architecture, especially the fiscal federal architecture established by the Constitution.

C.CSSs and federal tensions - Actions and Reactions

1. The practice of CSSs - The action

The practice of grants channelled via Article 282 has created wide scope for exercise of discretion by the Central Government in the matter of making grants to States for welfare projects. The quantum of funds to be devolved to the States under Article 275 are to be mandatorily fixed by the Finance Commission. The quantum of central assistance to States channelled via Article 282 is, in practice, determined by the Central Government.¹⁰⁰ Till the time they existed, the Planning Commission along with the NDC, both institutions under the Central Government, played a significant role in determining such grants. It is imperative to remember that the role of the Planning Commission or the NDC was not meant to be analogous to that of the Finance Commission in fixing the total quantum of the divisible pool and of the shares of the States.¹⁰¹ Both these bodies do not find mention under the Constitution.

CSSs are development programmes designed by the Centre and implemented by the States wherein funds are contributed by both tiers of government. CSSs are specific purpose grants extended to States by the Central Government in the form of Schemes.¹⁰² These grants are meant to augment State plan and expenditure, and implement programmes especially designed by the Central Government for attaining national priorities.¹⁰³

⁹⁶ Reddy and Reddy (n 64) 203.

⁹⁷ Govinda Rao (n 93).

⁹⁸ First Administrative Reforms Commission, *Report on Centre-State Relationships* (13th Report, Department of Administrative Reforms and Public Grievances, Government of India 1969) 15, para 12 <https://darpg.gov.in/sites/default/files/13_Report%20Centre%20State%20Relationship06272019165428.pdf> accessed 24 April 2021 ('First ARC').

⁹⁹ First ARC (n 98) 15, para 12. Eventually, the First ARC recommended that the Finance Commission be designated as the body which enunciates principles for making grants under Article 282.

¹⁰⁰ B P R Vithal, 'Role of Articles 275 and 282 in Federal Fiscal Transfers' (1997) 32(28) EPW 1691 ('Vithal').

¹⁰¹ Vithal (n 100).

¹⁰² Avani Kapur, 'Centre gives a lot of money to states for social welfare. A good policy, but only on paper' (*The Print*, 25 June 2019) <<https://theprint.in/opinion/centre-gives-a-lot-of-money-to-states-for-social-welfare-a-good-policy-but-only-on-paper/253685/>> accessed 20 May 2021 ('Kapur I').

¹⁰³ Avani Kapur, 'Towards 'Cooperative' Social Policy Financing in India' (*Centre for Policy Research*, 16 July 2019) <www.cprindia.org/latest-policy-challenges/tid/1713> accessed 03 June 2021.

Transfers under CSSs are conditional in nature. Till 2014, CSSs were designed by various Ministries of the Central Government in consultation with the Planning Commission. After the dissolution of the Planning Commission, the NITI Aayog, even though it does not formulate any Five-Year Plans, does play a significant role in designing CSSs.¹⁰⁴ Under many CSSs which are currently in operation, Centre's plan funds are transferred to the States for expenditure in areas that are, as per the Seventh Schedule of the Constitution, the States' responsibility.

Issues arising out of the channeling of Plan grants using Article 282 have been flagged persistently by government commissions that came after the ARC. In 1988, the Sarkaria Commission Report dealt with the issue of the Union Government spending significant amounts on the upkeep of schemes relating to subjects falling under the State List and Concurrent List.¹⁰⁵ A pointed issue that was brought to the attention of the Commission was as follows:

*"It has been pointed out by a State Government that the heavy dependence of the States on the Union for financial resources has resulted in progressive erosion of the jurisdiction, authority and initiative of the States in their own constitutionally defined spheres. Further, it has manifested in a gradual decline in the relative share of States' Plan outlay in the total, growing outlay of the Union on State subjects, proliferation of Centrally Sponsored Schemes and Union's tight control over planning in the States."*¹⁰⁶

Acknowledging the dent they created in the federal balance between the Centre and the States, the Sarkaria Commission recommended that the number of CSSs be kept to a minimum.¹⁰⁷ CSSs, in particular, were alleged to have made significant inroads into States' sphere of activity thereby affecting their priorities.¹⁰⁸ Chapter 11 of the Sarkaria Commission Report, titled "Economic and Social Planning", made the following observation about CSSs:

*"An overall policy with respect to Centrally Sponsored Schemes does not exist. There is overlapping of coverage in the schemes sponsored by different Union Ministries. At State level also, the consultations are made directly with concerned departments and such schemes are not well integrated with the States' Plans from the beginning. The discontinuation or modification of such schemes in some cases is also alleged to have been wasteful in terms of infrastructure developed for them."*¹⁰⁹

At the same time, the Commission observed that there were no reservations about the need for CSSs in programmes of inter-State relevance.¹¹⁰ The criticism with respect to CSSs then hinged on two crucial aspects – *first*, insufficient consultation with States and rigid conditionalities in the framing of CSSs, and *second*, inclusion of such programmes under CSSs which involve large outlays ostensibly in fulfilment of important national objectives.

Subsequently, the Sarkaria Commission highlighted the need for prior consultation with the States in devising the scope of these schemes.¹¹¹ Decentralisation in respect of formulation and consideration of differences in local conditions was eventually recommended for the framing of CSSs.

In 2010, the Commission on Centre-State Relations, chaired by Late Mr. Madan Mohan Punchhi, Former Chief Justice of India also assessed key questions pertaining to Centre-State relations in India. On the vertical imbalance in resource sharing, States pointed out that Central transfers to them had not been commensurate with their

¹⁰⁴ Nirvikar Singh (n 82).

¹⁰⁵ Report of the Sarkaria Commission, *Chapter XI – Economic and Social Planning* (Inter-State Council Secretariat, Government of India 1988) para 11.6.25 <<http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERXI.pdf>> accessed 24 April 2021 ('Sarkaria Commission Report, Chapter XI').

¹⁰⁶ Report of the Sarkaria Commission, *Chapter X – Financial Relations* (Inter-State Council Secretariat, Government of India 1988) para 10.7.34 <<http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERX.pdf>> accessed 24 April 2021 ('Sarkaria Commission Report, Chapter X').

¹⁰⁷ Sarkaria Commission Report, Chapter XI (n 105) para 11.2.25.

¹⁰⁸ Sarkaria Commission Report, Chapter XI (n 105) para 11.1.03.

¹⁰⁹ Sarkaria Commission Report, Chapter XI (n 105) para 11.6.21.

¹¹⁰ Sarkaria Commission Report, Chapter XI (n 105) para 11.6.22.

¹¹¹ Sarkaria Commission Report, Chapter XI (n 105) para 11.6.25.

growing responsibilities.¹¹² Simultaneously, States demanded an increase in their share of central taxes.¹¹³ The Punchhi Commission Report also alluded to how the proliferation of CSSs and Central Plan schemes placed severe constraints on the States in “*drawing and implementing schemes according to their priorities and the felt needs of the people.*”¹¹⁴ To rectify this, the Commission recommended a comprehensive review of all transfers to States with a view to minimising the component of discretionary transfers.¹¹⁵

The discourse on this subject has been summed up succinctly by constitutional scholar Professor MP Jain who said that Article 282 grants can be used by the Centre to “*persuade, encourage and pressurise the States*”¹¹⁶ to keep within their plan targets.

2. Restructuring and beyond - The reaction

With criticism against CSSs mounting, in 2015 a Sub-Group of Chief Ministers took note of several issues concerning the operation of CSSs and recommended well-meaning reforms. In pursuance of the decision taken at the first meeting of the Governing Council of the NITI Aayog held in February 2015, the Sub-Group of Chief Ministers on Rationalisation of Centrally Sponsored Schemes (Sub-Group/ Sub-Group of Chief Ministers) was constituted by the Prime Minister. The Sub-Group was created to discuss the rationalisation and restructuring of the CSSs in light of the Fourteenth Finance Commission’s recommendation for increased devolution of taxes to States.¹¹⁷ In its report, the Sub-Group observed that as a result of the increased tax devolution to the States, the total devolution being made to the States (at that point in time) increased from approximately Rupees 3.48 lakh crores to Rupees 5.26 lakh crores – which amounted to an estimated increase of Rs. 1.78 lakh crores for the Financial Year 2015-16.¹¹⁸ Consequently, the fiscal space available with the Central Government to fund CSSs shrunk.

The Sub-Group recommended reduction in the number of CSSs by integration of several such schemes under fewer heads or Umbrella Schemes.¹¹⁹ The Sub-Group also recommended withdrawal of certain CSSs, such as the Backward Regions Grants Fund (BRGF), the Panchayat Sashaktikaran Yojana, the Normal Central Assistance for State Plans, the National E-governance Action Plan, the Scheme for Empowerment of Adolescent Girls (SABLA), and many other smaller schemes.¹²⁰ Following this reduction and withdrawal, the existing 28 functional CSSs were grouped into ‘*Core Schemes*’ (with a funding ratio of 60:40 between the Central Government and State Government for General Category States and 90:10 for the 8 North-Eastern¹²¹ and 3 Himalayan States¹²²) and ‘*Optional Schemes*’ (with a funding ratio of 50:50 for General Category States and 80:20 for 8 North-Eastern and 3 Himalayan States). Amongst the ‘*Core Schemes*’, those for social protection and social inclusion were grouped

¹¹² Report of the Commission on Centre-State Relations, *Volume III – Centre-State Financial Relations and Planning* (Inter-State Council Secretariat, Government of India, 2010) 38, para 5.3.01 <<http://interstatecouncil.nic.in/wp-content/uploads/2015/06/volume3.pdf>> accessed 24 April 2021 (‘Punchhi Commission Report’).

¹¹³ Punchhi Commission Report (n 112).

¹¹⁴ Punchhi Commission Report (n 112) para 5.3.01.

¹¹⁵ Punchhi Commission Report (n 112) para 5.3.01.

¹¹⁶ Samaraditya Pal and Ruma Pal, *MP Jain: Indian Constitutional Law*, vol 2 (6th edn, Lexis Nexis 2013) 947 (‘MP Jain’).

¹¹⁷ Report of the Sub-Group of Chief Ministers on Rationalisation of Centrally Sponsored Schemes (NITI Aayog, Government of India 2015) <<https://niti.gov.in/sites/default/files/2019-08/Final%20Report%20of%20the%20Sub-Group%20submitter%20to%20PM.pdf>> accessed 24 April 2021 (‘Sub-Group of CMs Report’).

¹¹⁸ Sub-Group of CMs Report (n 117) 8, para 2.6.

¹¹⁹ Sub-Group of CMs Report (n 117) 28, para 4.13.

¹²⁰ Sub-Group of CMs Report (n 117) 30-32, para 4.14; See, Amarnath H K and Alka Singh, ‘Impact of Changes in Fiscal Federalism and Fourteenth Finance Commission Recommendations Scenarios on States Autonomy and Social Sector Priorities’ (2019) National Institute of Public Finance and Policy Working Paper Number 257 <www.nipfp.org.in/publications/working-papers/1852/> accessed 19 April 2021 (‘Amarnath and Singh’).

¹²¹ The eight North-Eastern states are Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura.

¹²² The three Himalayan States are Himachal Pradesh, J&K and Uttarakhand.

as ‘Core of the Core Schemes’ (with 100 percent central assistance) with the first charge on available funds for the National Development Agenda.¹²³

However, as the adage goes, the more things change, the more they stay the same. Although the Fourteenth Finance Commission increased the tax devolution towards the States, it was squared up by the increased contribution of States towards their funding obligations for CSSs. The sharing pattern for General Category states for schemes which were christened as Core Schemes was modified from the earlier 75:25 to 60:40.¹²⁴ This, in turn, has increased the contributions States are expected to make to these CSSs. The General Category States had to bear the burden of the modified fund-sharing pattern of CSSs between the Centre and the States.¹²⁵ Further, the withdrawal of the BRGF has not worked well for the backward States.¹²⁶ Eventually, as concluded by Amarnath HK and Alka Singh, the higher transfers to States by way of increased tax devolution and more autonomy to States were offset by increasing the States’ contribution towards CSSs.¹²⁷

Further, even though the Sub-Group recommended consolidation of several smaller schemes or schemes which were similar/ related to each other under Umbrella Schemes, this restructuring did not have the intended impact. The Sub-Group concerned itself with merely grouping the schemes together, without making them more effective.¹²⁸ The Sub-Group recommended that CSSs for which the Centre had undertaken to provide funds till 31 March 2015, the sharing pattern to the tune of 75:25 would continue till March 2017. However, were the projects undertaken under these schemes to remain incomplete even thereafter, States would have to complete the projects using their own funds.¹²⁹ Effectively, this meant that after March 2017, the burden of continuing projects under such CSSs was to fall on States entirely.¹³⁰ Moreover, many discontinued schemes, like the National Scheme for Modernisation of Police and Other Forces, were brought back the very next year and several new schemes were launched.¹³¹ Further, the sudden discontinuation of a CSS midway through the Financial Year resultantly increased the fiscal burden on the States for the continuation of a certain project because of several factors, such as service conditions attached to government employees working on a project or, in some cases, prevailing political pressures.¹³² For all practical purposes, then, the proposed rationalisation was more in the nature of a reaction (and not a well-considered policy intervention) to the issues often cited against CSSs.

D. CSSs and Public Health

Public expenditure on health has also been a major concern. Despite the larger revenue base enjoyed by the Union, it does not spend as much as the States on public health. According to the National Health Accounts 2017, 66% of healthcare expenditure was borne by the States.¹³³ By the end of 2020, the share of States in total government

¹²³ Sub-Group of CMs Report (n 125) 28 para 4.1.1. For a list of these 28 schemes, see Ministry of Finance Budget Division, ‘Expenditure Profile 2021-2022: Statement 4A’ (*Government of India*, February 2021) <https://www.indiabudget.gov.in/doc/eb/vol1.pdf> accessed 26 June 2021.

¹²⁴ Amarnath and Singh (n 120).

¹²⁵ Amarnath and Singh (n 120).

¹²⁶ Amarnath and Singh (n 120).

¹²⁷ Amarnath and Singh (n 120).

¹²⁸ Kapur I (n 102).

¹²⁹ Sub-Group of CMs Report (n 117) 43 para 4.40.

¹³⁰ Amarnath and Singh (n 120).

¹³¹ Avani Kapur and Vikram Srinivas, ‘Why the Centre needs to give states more control over schemes it co-finances’ (*Scroll.in*, 29 March 2016) <<https://scroll.in/article/805191/why-the-centre-needs-to-give-states-more-control-over-schemes-it-co-finances>> accessed 24 April 2021.

¹³² For example, grants under BGRF, National E-Governance Plan, Panchayat Shashaktikaran Scheme, and a few other CSS were discontinued by the Centre with effect from 2015-16. The discontinuation caused an increased burden on low-income States such as Bihar, Jharkhand, Odisha, Madhya Pradesh, and Chhattisgarh. See, ‘Odisha to bear Rs. 6,127-cr burden as center delinks CSS’, *Business Standard* (Bhubaneswar, 2 December 2015) <www.business-standard.com/article/economy-policy/odisha-to-bear-rs-6-127-cr-burden-as-center-delinks-css-115120200744_1.html> accessed 22 June 2021.

¹³³ Global Burden of Disease Study 2016; Economic Survey 2020-2021 Vol I Chapter 5 <www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/echap05_vol1.pdf> accessed 12 April 2021.

spending on health, inclusive of expenditure on CSSs, was calculated to be around 87 per cent.¹³⁴ This does not sit well with the fact that public health systems in India have been repeatedly criticised for being top-down – much of the planning happens at the Centre despite public health being a State subject. Several public health delivery systems are a consequence of schemes framed by the Central Government and implemented by State agencies. Effectively, while decision-making happens in Delhi, execution and spending is at the level of the State and local governments. Scholarly literature at the intersection of constitutional law, public finance and public health has amplified the problems that CSSs pose for the healthcare sector. The claim that the proliferation of CSSs has placed a dent in the fiscal federal balance is founded primarily in the mechanics of how these schemes function.

In a press release dated 10 August 2018, the Ministry of Health and Family Welfare of the Government of India said that while health is a State subject, the ‘*Central Government supplements the efforts of the State Governments in delivery of health services through various schemes of primary, secondary and tertiary care.*’¹³⁵ The press release then went on to annex a list of Central Sector Schemes and CSSs which are related to health, and fell within the domain of the Ministry of Health and Family Welfare. This annexure mentions only two CSSs – the National Health Mission (NHM) and the Rashtriya Swasthya Bima Yojana (RSBY).

However, schemes other than the NHM and RSBY, even those which are strictly not within the domain of the Ministry of Health and Family Welfare, touch upon aspects related to public health. Where the components of a particular CSS do not directly touch upon the subject, they may be concerned with other aspects ancillary to public health which fall elsewhere under the State List or the Concurrent List. For instance, the National Rural Drinking Water Mission (or the Jal Jeevan Mission/ JJM) is a CSS with the following vision:

“*Every rural household has drinking water supply in adequate quantity of prescribed quality on regular and long-term basis at affordable service delivery charges leading to improvement in living standards of rural communities.*”¹³⁶

The primary output of the JJM is “*providing all rural households with a Functional Household Tap Connection (FHTC) by 2024.*”¹³⁷ One of the key measurable outcomes of the JJM is improved *health conditions* of rural communities.¹³⁸ JJM is only one of several other CSSs which tangentially expect the States to spend resources on aspects concerning public health. A preliminary list of schemes, which indirectly touch upon aspects of public health while directly concerning other subject-matters follows. It must be mentioned that besides pertaining to public health, these CSSs also touch upon other subjects under List II as well as List III.

¹³⁴ Sunil Kumar Sinha and Devendra Kumar Pant, ‘Covid-19: The true state of healthcare expenditure in India’ *The Financial Express* (8 December 2020) <www.financialexpress.com/opinion/covid-19-the-true-state-of-healthcare-expenditure-in-india/2145238/> accessed 29 June 2021.

¹³⁵ Ministry of Health and Family Welfare, Government of India, ‘Health Programmes/ Schemes’ (*Press Information Bureau*, 10 August 2018) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1542736>> accessed 26 June 2021.

¹³⁶ Ministry of Jal Shakti, ‘Operational Guidelines for the Implementation of Jal Jeevan Mission’ (*Government of India*, December 2019) <https://jalshakti-ddws.gov.in/sites/default/files/JJM_Operational_Guidelines.pdf> accessed 26 June 2021 p. 14 (‘JJM Operational Guidelines’).

¹³⁷ JJM Operational Guidelines (n 136) 67.

¹³⁸ JJM Operational Guidelines (n 136) 67.

Table 1: List of CSSs which directly/ indirectly pertain to public health and other subjects under List II and List III

Name of the CSS ¹³⁹	Nodal Ministry	Concerned Seventh Schedule List and Entry ¹⁴⁰	Aim(s)
Umbrella Programme for Development of Other Vulnerable Groups	Ministry of Social Justice and Empowerment	List II Entries 6, 9 List III Entries 16, 20, 23	To assist persons with special needs in procuring durable, sophisticated and scientifically manufactured, modern, standard aids and appliances that can promote their physical, social and psychological rehabilitation, by reducing the effects of disabilities and enhancing their economic potential. ¹⁴¹
Rashtriya Swasthya Bima Yojana	Ministry of Labour and Employment	List II Entry 6 List III Entries 20, 23, 24	To provide health insurance coverage to Below Poverty Line (BPL) families; to provide protection to BPL households from financial liabilities arising out of health shocks that involve hospitalisation. ¹⁴²
Jal Jeevan Mission (JJM)/National Rural Drinking Water Mission	Ministry of Jal Shakti	List II Entries 6, 17 List III Entries 18, 20	To to provide safe and adequate drinking water through individual household tap connections by 2024 to all households in rural India. ¹⁴³
National Health Mission	Ministry of Health & Family Welfare	List II Entries 6, 8, 9, 10 List III Entries 16, 18, 19, 20, 20A, 29	To attain universal access to equitable, affordable and quality health care services, that are accountable and responsive to people's needs, with effective inter-sectoral convergent action to address the wider social determinants of health. ¹⁴⁴
National Programme of Mid Day Meal in Schools	Ministry of Education	List II Entries 6, 9 List III Entries 18, 20, 25	To improve enrollment, attendance, and retention of disadvantaged children in schools, and simultaneously improve the nutritional status of children. ¹⁴⁵

¹³⁹ The names of these CSSs have been sourced from Statement 4A of the Expenditure Profile, Union Budget 2021-2022. See, Ministry of Finance Budget Division, 'Expenditure Profile 2021-2022' (*Government of India*, February 2021) <https://www.indiabudget.gov.in/doc/eb/vol1.pdf> accessed 26 June 2021.

¹⁴⁰ The subject-matter/ description of each of these entries can be found in **Annexure I** of this report.

¹⁴¹ Green Governance Initiative, 'Goal 10: Reduced Inequalities' <<https://ggiindia.in/goal-10-reduced-inequalities/>> accessed 25 June 2021.

¹⁴² 'Rashtriya Swasthya Bima Yojana' (*National Portal of India*) <<https://www.india.gov.in/spotlight/rashtriya-swasthya-bima-yojana#rsby2>> accessed 26 June 2021.

¹⁴³ JJM Operational Guidelines (n 136).

¹⁴⁴ National Health Portal, 'National Health Mission' <https://www.nhp.gov.in/national-health-mission_pg> accessed 25 June 2021 ('NHM').

¹⁴⁵ Ministry of Education, Government of India, 'About the Mid Day Meal Scheme' <http://mdm.nic.in/mdm_website/> accessed 25 June 2021.

Name of the CSS ¹³⁹	Nodal Ministry	Concerned Seventh Schedule List and Entry ¹⁴⁰	Aim(s)
Swachh Bharat Mission	Ministry of Housing and Urban Affairs	List II Entries 5, 6, 10 List III Entries 20, 29	To make urban India free from open defecation and achieving 100% scientific management of municipal solid waste in 4,041 statutory towns in the country. ¹⁴⁶
Swachh Bharat Mission (Grameen)	Ministry of Jal Shakti	List II Entries 5, 6, 10 List III Entries 20, 29	To improve the general quality of life in rural areas, by promoting cleanliness, hygiene and eliminating open defecation. ¹⁴⁷
Urban Rejuvenation Mission: AMRUT and Smart Cities Mission	Ministry of Housing and Urban Affairs	List II Entries 6, 13, 17 List III Entries 20, 23	To provide basic civic amenities (in cities) like water supply, sewerage, urban transport, and parks so as to improve the quality of life for all, especially the poor and the disadvantaged. ¹⁴⁸
Saksham Anganwadi and Poshan 2.0 (Umbrella ICDS-Anganwadi Services, Poshan Abhiyan, Scheme for Adolescent Girls, National Creche Scheme)	Ministry of Women & Child Development	List II Entries 2, 6, 9 List III Entries 16, 18, 20, 23, 25, 26	To develop practices that will nurture health, wellness and immunity of children and pregnant women, and fight malnutrition. ¹⁴⁹

[Disclaimer: This is not claimed to be an exhaustive list of entries that these schemes can touch upon. The exact aims and objectives of each of these schemes are much wider, which potentially indicates that the number of State subjects/List II subjects they can touch upon will be higher.]

Effectively, the formulation of such CSSs means that States are expected to determine their spending priorities based on schemes which are devised by the Centre. Transfers through CSSs have not been adequately successful in bridging inter-State disparities in the achievement of key health indicators.¹⁵⁰ Since the onset of the pandemic, the issues surrounding the mechanics of CSSs have become more pronounced. For starters, it has been pointed out that the scheme of nutrition financing in India is ill-prepared to deal with the current public health crisis, partly because of its fragmented nature.¹⁵¹ The Indian government's nutrition financing strategy hinges on CSSs such as the Integrated Child Development Services (ICDS) and the NHM. The ICDS is a scheme which was launched in

¹⁴⁶ Ministry of Housing and Urban Affairs, Government of India, 'Swachh Bharat Mission' <<http://mohua.gov.in/cms/swachh-bharat-mission.php>> accessed 25 June 2021.

¹⁴⁷ Department of Drinking Water and Sanitation, Ministry of Jal Shakti, Government of India, 'Swachh Bharat Mission - Grameen' <<https://swachhbharatmission.gov.in/SBMCMS/index.htm>> accessed 25 June 2021.

¹⁴⁸ Ministry of Housing and Urban Affairs, Government of India, 'Atal Mission for Rejuvenation and Urban Transformation' <<http://amrut.gov.in/content/innerpage/the-mission.php>> accessed 25 June 2021.

¹⁴⁹ Poshan 2.0 (n 22).

¹⁵⁰ Niranjana Sahoo, 'An Examination of India's Federal System and its Impact on Healthcare' (October 2016) Issue No. 160 *ORF Issue Brief* 4 <https://www.orfonline.org/wp-content/uploads/2016/10/ORF_IssueBrief_160_HealthFederalism_FinalForUpload.pdf> accessed on 25 June 2021.

¹⁵¹ Avani Kapur, 'How to design nutrition financing' (June 2020) 730 *Seminar* 40, 42 ('Kapur II').

1975 and “*is a unique early childhood development programme, aimed at addressing malnutrition, health and also development needs of young children, pregnant and nursing mothers.*”¹⁵² Avani Kapur has observed that nutrition financing which is contingent on service-delivery through CSSs, has resulted in a ‘*fragmented system that fails to account for the linkages between nutrition and gender, water and sanitation.*’¹⁵³ Part of this fragmentation is the outcome of several sub-schemes which deal with different aspects of nutrition (and target different groups within the population), are the consequence of multiple Central and State nutrition interventions, financed by different Union ministries and State departments.¹⁵⁴

While the list above broadly mentions the Umbrella Schemes which deal with aspects of health/ public health, the number of smaller/ sub-schemes under some of them merit attention. The NHM, for instance, broadly aims at achieving “*universal access to equitable, affordable and quality health care services that are accountable and responsive to people’s needs.*”¹⁵⁵ A cursory glance at the guidelines issued under the NHM will reveal the vast expanse covered by this scheme, including aspects ranging from health insurance, curbing the spread of communicable diseases, nutrition, and several other aspects.¹⁵⁶ Professor M Govinda Rao has pointed out that the prevalence of multiple sub-schemes with different objectives to be financed results in resources being thinly spread.¹⁵⁷ At the same time, it becomes difficult to specify with precision the target in terms of minimum standards of services which are to be achieved by a State.¹⁵⁸

The institutional mechanics of CSSs, as noted by Kapur, require multiple levels of jurisdictions to work together.¹⁵⁹ For instance, implementation of the National Urban Health Mission (NUHM) is carried out by functionaries at the Central, State and city levels.¹⁶⁰ At the central level, the National Programme Management Unit provides technical assistance to the Urban Health Division of the Ministry of Health and Family Welfare; at the State level, State Programme Management Units are set up, which report directly to the State Mission Director.¹⁶¹ At the city level, separate City Urban Health Missions/ City Urban Health Societies are set up under the overall guidance of urban local bodies (ULBs).¹⁶² The establishment of multiple bodies leads to overlap in roles and responsibilities within a single jurisdiction, unavoidably leading to problems with regard to fixing accountability and ensuring coordination.¹⁶³

E. Conclusion and Key Takeaways

Evidently, routing money to States via CSSs, even though not strictly unconstitutional, is ridden with multiple issues associated with the fiscal federal scheme established by the Constitution. While discussing vertical distribution of moneys, Y.V. Reddy and G.R. Reddy mention the issues that CSSs create for State Governments. As explained above, CSSs operate on the basis of a sharing pattern. Unlike Central Sector schemes which are fully funded by the Centre, CSSs are jointly funded by the Centre as well as the States. The standard pattern of sharing prescribed across CSSs and, more importantly, across States fails to account for differences in needs. In fact, an oft-cited criticism of CSSs is that they do not respond to needs, instead focusing on a one-size-fits-all approach for all States.

¹⁵² ‘Integrated Child Development Scheme (ICDS): Manual for District Level Functionaries’ <<https://darpg.gov.in/sites/default/files/ICDS.pdf>> accessed 25 June 2021.

¹⁵³ Kapur II (n 151) 41.

¹⁵⁴ Kapur II (n 151) 42.

¹⁵⁵ NHM (n 144).

¹⁵⁶ NHM (n 144).

¹⁵⁷ Govinda Rao (n 93) 21.

¹⁵⁸ Govinda Rao (n 93) 21.

¹⁵⁹ Kapur II (n 151) 41.

¹⁶⁰ Ministry of Health and Family Welfare, ‘Guidelines for Financial Management Under NUHM’ (*Government of India*, 27 March 2017) <http://nhm.gov.in/images/pdf/NUHM/NUHM_FMG_Guidelines.pdf> accessed 25 June 2021 (‘NUHM Guidelines’).

¹⁶¹ NUHM Guidelines (n 160).

¹⁶² NUHM Guidelines (n 160).

¹⁶³ Kapur II (n 151) 42.

The manner in which Article 282 practically unfolded raises questions about how it should have been interpreted. The following Chapter analyses the possible interpretation that could be accorded to Article 282, particularly in light of Article 275 and the overall architecture of fiscal federalism under the Constitution.

Key Takeaways

CSSs were institutionalised through the Planning Commission after its emergence in 1950. Even though the Planning Commission has been dissolved, and attempts have been made to rationalise and restructure CSSs, they still form a heavily relied upon route for effecting inter-governmental transfers from the Union to the States.

The practice of routing funds to the States through this one-size-fits-all mechanism of CSSs causes inroads in the fiscal space of States.

There are several CSSs currently in operation which touch upon public health, constitutionally a matter under the legislative and administrative domain of the States. Owing to opacity in transfer mechanisms, the exact number of CSSs (on public health) at a specific time and the expenditure incurred by the Centre or State Governments towards these schemes cannot be ascertained.

IV. How was Article 282 expected to work in practice?

Article 282, as finally adopted under the Constitution, reads thus:

“The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.”

In 1971, the Rajamannar Committee Report rued the inadequacy of the framework originally envisaged in the Constitution for regulating the transfer of resources between the Centre and the States.¹⁶⁴ The Committee observed that “Article 282 was not intended to “make grants” tied with conditions to States.”¹⁶⁵ This concern primarily stemmed from the fact that a significant portion of Central resources to States were being channelled via Article 282, on the recommendations of the Planning Commission, on discretionary and conditional terms.

If the prevailing use of Article 282 was not meant to be, what did the framers of the Constitution intend for this provision? More importantly, how was Article 282 supposed to exist within the overall fiscal federal architecture of the Constitution? This Chapter attempts to answer these questions with the help of opinions tendered by constitutional law scholars on the present subject. The matters for consideration before the Ninth Finance Commission (1990-1995), along with the opinions given on these matters, are crucial to the interpretation of Article 282. Equally significant are the arguments furthered before the Supreme Court in *Bhim Singh v. Union of India*.¹⁶⁶ With the aid of these two tools, this Chapter develops an understanding of how a potential interpretation of Article 282 can shape up.

A. Ninth Finance Commission and intergovernmental transfers

It would not be incorrect to say that tools for interpreting Article 282 are quite few and far in between. As mentioned above, Article 282 was not intensely debated by the Constituent Assembly. Barring one significant occasion in *Bhim Singh*, a body of case-law on this provision remains conspicuously absent. However, crucial questions around interpretation of Article 282 arose for the consideration of the Ninth Finance Commission. The Ninth Finance Commission corresponded to the period between 1990-1995.

Discussions around this provision, borne largely out of the controversies arising out of its implementation, give crucial leads on its interpretation. The Ninth Finance Commission received opinions from eminent constitutional law scholars on the import of Articles 275, 280 and 282. The most well-known of these is an opinion authored by Late Mr. Nani A. Palkhivala, who opined that ‘Article 282 was not intended to enable the Union to make such grants as fall properly under Article 275.’¹⁶⁷ Besides this, a wealth of scholarly opinions exists in a curated selection of papers presented at the National Institute of Public Finance and Policy (NIPFP) seminars held in February 1988 and May 1990. These papers dabbled with several issues and concerns raised before the Ninth Finance Commission. This selection of papers comprises the minutes of a ‘Round Table Discussion on Legal Issues’, which

¹⁶⁴ Rajamannar Committee Report (n 15) 94.

¹⁶⁵ Rajamannar Committee Report (n 15) 92.

¹⁶⁶ *Bhim Singh v. Union of India*, (2010) 5 SCC 538 (*‘Bhim Singh’*).

¹⁶⁷ Second Report of the Ninth Finance Commission Report: For 1990-95 (Government of India Press 1989) 28 <<https://ia802902.us.archive.org/28/items/dli.csl.212/212.pdf>> accessed 25 June 2021 (*‘Ninth FC Report’*).

witnessed participation from eminent scholars of constitutional law, and public finance.¹⁶⁸ Certain specific questions pertaining to grants under Article 282 which were discussed at this Round Table¹⁶⁹ are as follow:

- *First*, does Article 282 permit transfer of funds by the Centre to the States or by one State to another for specific public purposes only as a residuary head of transfer, as the marginal heading of the Article suggests? Or does it enable the Centre (as well as the States) to make transfers freely for purposes outside their respective jurisdictions?¹⁷⁰
- *Second*, can it be argued that the Finance Commission can recommend grants-in-aid under both provisions, namely, Article 275 and Article 282?
- *Third*, does Article 275 authorise general or untied grants or does it also permit specific or conditional grants?
- *Fourth*, can grants be given under Article 275 for capital purposes also?

In light of these questions, the issues surrounding interpretation of Article 282 can be condensed into the following – *first*, the true import of Article 282 in light of the constitutional scheme of Centre-State relations and the placement of Article 282 in the chapter (in the Constitution) on financial relations; and *second*, the role of the Finance Commission in determining intergovernmental transfers.

1. True import of Article 282 in light of the constitutional scheme

Article 282 enables the Centre and the States to mutually make grants, beyond the subjects over which they have legislative jurisdiction. Practically, the role of the Planning Commission in recommending grants under Article 282 had remained predominant. Scholarly work has categorically attributed a two-fold purpose to grants made under Article 282 – *first*, to assist States towards fulfilment of their Plan targets, and *second*, to provide some scope to the Centre to influence State action to effectuate the national plan.¹⁷¹

Senior Advocate K.K. Venugopal, along with several other eminent constitutional law scholars, comprehensively discussed issues concerning interpretation of Articles 275 and 282 in the Round Table Discussion. In his opinion, Venugopal argued that a lot more has been read into Article 282 than is warranted. He observed that Article 282 has been interpreted as conferring a “residuary power” which enables the Union at its discretion, and without any control from the Finance Commission or any other authority, to transfer resources to States as it desires.¹⁷² In his opinion on the language employed in Article 282, Venugopal explained the true import of the provision by viewing it in the backdrop of the “quasi-federal distribution of legislative powers”¹⁷³ under the Constitution.

Venugopal opined that a restrictive understanding of Article 275, and a simultaneous expansion of the contours of Article 282, has the effect of causing “*an imbalance in the quasi-federal structure of the Constitution because the various States which need funds would have to rely on the goodwill of the Central government for financial help.*”¹⁷⁴ Decrying the need for external aids for interpreting the financial provisions because of the absence of

¹⁶⁸ *The Ninth Finance Commission: Issues and Recommendations* (National Institute of Public Finance and Policy 1993) 207-235 <https://www.nipfp.org.in/media/pdf/books/BK_35/The%20Ninth%20Finance%20Commission%20Issues%20And%20Recommendations.pdf> accessed 25 June 2021 ('Ninth FC Papers'). This is a compilation of papers presented at NIPFP Seminars held in February 1988 and May 1990.

¹⁶⁹ The Round Table witnessed participation from Justice A S Qureshi (in Chair), Dr. A Bagchi, Mr. K K Venugopal, Mr. A G Noorani, Mr. B Errabbi, Ms. Renuka Viswanathan, Mr. N K P Salve, Dr. M. D. Godbole, Dr. H. K. Paranjape, Prof I. S. Gulati, Dr. G Thimmiah, Dr. Raja Chelliah, Mr. Madhava S Menon.

¹⁷⁰ Ninth FC Papers (n 168) 207.

¹⁷¹ MP Jain (n 116).

¹⁷² Ninth FC Papers (n 168) 211.

¹⁷³ Ninth FC Papers (n 168) 210-211.

¹⁷⁴ Ninth FC Papers (n 168) 211.

any ambiguity, Venugopal took a deep dive into the language of Article 275.¹⁷⁵ Article 275, insofar as relevant for our discussion, reads thus:

“Grants from the Union to certain States.—(1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State....”

Venugopal turned his attention to the phrase “*grants-in-aid of the revenues of such States*” used in clause (1) of Article 275. Venugopal took the aid of the first proviso to build an interpretation of this phrase. He explained that the proviso interprets this phrase “*by setting out what expenditure or grants would be covered by it.*”¹⁷⁶ Based on a reading of the first proviso (extracted above), Venugopal argued that “*a proviso does not add a new area to an existing provision; it only carves out an area from that covered by the main provision and gives it special treatment.*”¹⁷⁷ For the purpose of Article 275, this means that besides covering grants for capital and revenue expenditures for promoting the welfare of Scheduled Tribes in a particular State (through the proviso), the main provision (clause (1) of Article 275) includes grants of both capital and revenue nature for Special Development schemes.¹⁷⁸ Consequently, *per* Venugopal, all Plan expenditure, special purpose grants as well as tied grants would fall within the scope of Article 275(1).¹⁷⁹ This construction of Article 275(1) was also supported by B. Errabbi, when he pointed out to the under-use of this provision by the Government by bringing within its ambit only grants-in-aid of a revenue nature, and not a capital nature.¹⁸⁰ Errabbi summed up his point by saying that the main provision (of Article 275(1)) should be interpreted in light of the provisos, which mention grants of both capital and revenue nature.¹⁸¹

Thus, Venugopal and Errabbi afforded a vast expanse of intergovernmental transfers that are covered by Article 275. At the same time, he discussed the need for a provision like Article 282 which envisages grants by the Union and the States for any public purpose, within a Constitution that already houses Article 275. In the specific context of Article 282, Venugopal said that this provision lifts the bar created by the List system (under the Seventh Schedule) and the distribution of legislative powers under the Constitution. In his opinion, Venugopal mentioned that Article 282 lifts the embargo imposed by the List system and enables the States and the Union to mutually make grants to the State institutions by the Union and vice versa.¹⁸² However, Venugopal’s opinion carries no indication as to when (or under what circumstances) this embargo can be constitutionally lifted, or what would comprise ‘public purpose’ under Article 282.

Besides Venugopal’s interpretation, certain other factors, some of which have been pointed out by other eminent scholars, indicate that Article 282 was not intended to be the regular channel for transfer of resources from the Centre to the States. Article 282 appears under the heading “Miscellaneous Financial Provisions” in Chapter I relating to the financial provisions in the Constitution. This establishes that the provision is separate from the other articles which deal with regular transfers and was not intended to be used as a regular channel of grants. A.G. Noorani, who was also a participant in the Round Table, opined on Article 282 that it was ‘*unthinkable that a provision of the magnitude which is now ascribed to it would have occurred under “Miscellaneous Financial*

¹⁷⁵ Ninth FC Papers (n 168) 211.

¹⁷⁶ Ninth FC Papers (n 168) 212.

¹⁷⁷ Ninth FC Papers (n 168) 212.

¹⁷⁸ Ninth FC Papers (n 168) 212.

¹⁷⁹ Ninth FC Papers (n 168) 212.

¹⁸⁰ Ninth FC Papers (n 168) 222.

¹⁸¹ Ninth FC Papers (n 168) 222-223.

¹⁸² Ninth FC Papers (n 168) 213.

*Provisions” at all.”*¹⁸³ Noorani also pointed to the fact that Article 282 connotes the conferment of a spending power, without conferring legislative power.¹⁸⁴ He also alluded to the need for construing Article 282 in harmony with other provisions of the Constitution. To that end, he crucially observed that in accordance with a harmonious construction of the three provisions, it would not be possible for the Union to make grants under Article 282 in a manner which would undermine or reduce the significance of Article 275 or Article 280.¹⁸⁵

2. Role of the Finance Commission in determining intergovernmental transfers

The widening of the scope of Article 282 has, in part, been caused by an artificial distinction created between transfers under Article 275 and those under Article 282. Soon after the coming into force of the Constitution, the Planning Commission was established by a Cabinet Resolution.¹⁸⁶ In due course, and as a matter of practice, the phrase “grants-in-aid” under Article 275 came to be construed in a limited manner to cover only general grants of a revenue character, non-Plan expenditure, and untied grants. Simultaneously, grants on capital account and grants to cover Plan expenditure fell outside the ambit of Article 275.¹⁸⁷ The Rajamannar Committee Report had observed that the importance of the Finance Commission had been considerably affected by the “*so-called plan grants*”.¹⁸⁸ The Report also stated that nothing in the Constitution prohibited the Finance Commission from making recommendations for Plan Grants as well.¹⁸⁹

Venugopal attributed the creation of the artificial distinction to the absence of the definition of the term “*grants-in-aid of the revenues of such States*”, which occurs in Article 275.¹⁹⁰ By the time of the constitution of the Ninth Finance Commission, grants from the Centre to States made under Article 282 had significantly increased. It is in this context that a key aspect of Venugopal’s opinion becomes relevant – the scope and ambit of the Finance Commission’s role in recommending grants-in-aid to the States. Venugopal invited attention to clause (3), sub-clause (b) of Article 280¹⁹¹ which confers on the Finance Commission the duty to make recommendations to the President as to the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India. Venugopal advocated for an interpretation of “*grants-in-aid of the revenues of the States*” which comprehends “*capital and revenue, Plan and non-Plan, special purposes, tied and untied*”. Thereafter, he argued that every single grant would fall within the purview of Article 280(3)(b), and the Finance Commission has no option but to recommend grants under Article 282 as well.¹⁹² It is not permissible for the Centre, through an institution such as the Planning Commission (till it existed), to perform the duty which has been conferred on the Finance Commission. Venugopal summed up his view in the following words:

*“....Article 282 has nothing whatsoever to do with the making of grants exclusively in derogation of the powers of the Finance Commission under Article 275. Article 282 merely lifts the bar which otherwise would prevent the Centre or the States from making grants outside the topics which have been entrusted to them for the purpose of legislation by the Constitution. That is really the answer.”*¹⁹³

¹⁸³ Ninth FC Papers (n 168) 214.

¹⁸⁴ Rajamannar Committee Report (n 15) 96.

¹⁸⁵ Ninth FC Papers (n 168) 215.

¹⁸⁶ Planning Commission Resolution (n 12).

¹⁸⁷ Reddy and Reddy (n 64) 202.

¹⁸⁸ Rajamannar Committee Report (n 15) 99, para 58.

¹⁸⁹ Rajamannar Committee Report (n 15) 89, para 42.

¹⁹⁰ Venugopal points out that Article 366 of the Constitution does not define this term.

¹⁹¹ Article 280 provides for the constitution and duties of the Finance Commission.

¹⁹² Ninth FC Papers (n 168) 228.

¹⁹³ Ninth FC Papers (n 168) 228.

Noorani pointed out the “*gross abuse of power, in a purely legal sense*”¹⁹⁴ which was a consequence of the use of Article 282 as an instrument of Plan transfers. The issue for Noorani was the significant role and dimension assumed by the Planning Commission in effecting transfers via Article 282, something he said was “unimaginable.”¹⁹⁵ In principle, Venugopal and Noorani’s opinions echoed the sentiment of the Rajamannar Committee Report, which deemed it absolutely necessary that an impartial body like the Finance Commission be entrusted with the distribution of funds and making of grants.¹⁹⁶

This is not to say that all voices at the Round Table took similar views. Renuka Viswanathan did not support the view that just because the Finance Commission is a body of experts it would be best placed as the exclusive agency for transfer of funds between the Centre and States.¹⁹⁷ In fact, she alluded to potential advantages in utilising the political mechanism of bodies like the NDC or the Planning Commission for effecting transfers.¹⁹⁸ Needless to say, the discussion at this Round Table carried a multiplicity of views.

However, despite receiving multiple opinions, eventually the Ninth Finance Commission did not involve itself in the controversy pertaining to the precise limits of Article 282 vis-a-vis Article 275.¹⁹⁹ The controversy surrounding the exact scope and contours of Article 282 had its moment in the Supreme Court though, exactly once.

3. Supreme Court’s tryst with Article 282

In the early years of the coming into force of the Constitution, the judiciary justified the scope of Article 282 while deciding questions around the appropriateness of State Government spending decisions, rather than on the appropriateness of central transfers or the constitutionality of an institutional mechanism for intergovernmental transfers.²⁰⁰ The occasion for confronting questions concerning interpretation of Article 282, and the constitutionality of transfers made under it, arose in *Bhim Singh v. Union of India*.²⁰¹

Bhim Singh concerned a challenge to the constitutionality of the Members of Parliament Local Area Development Scheme (MPLADS).²⁰² The challenge in this case hinged on a substantial question of the interpretation of Article 275 and Article 282.²⁰³ Specifically in the context of Article 282, it was contended that by virtue of falling under the head ‘Miscellaneous Financial Provisions’, this provision granted only an emergency power to make grants in exceptional situations for well-defined ‘public purposes’, and could not be used for broad grant-making powers. In other words, Article 282 could not be used as a second channel of transfer from the Union to the States, in addition to Article 275. To that end, the petitioners²⁰⁴ contended that:

¹⁹⁴ Ninth FC Papers (n 168) 219.

¹⁹⁵ Ninth FC Papers (n 168) 219.

¹⁹⁶ Rajamannar Committee Report (n 15) 101.

¹⁹⁷ Ninth FC Papers (n 168) 224.

¹⁹⁸ Ninth FC Papers (n 168) 224-225.

¹⁹⁹ Ninth FC Report (n 167) 28.

²⁰⁰ Nirvikar Singh (n 82).

²⁰¹ (2010) 5 SCC 538 (“*Bhim Singh*”).

²⁰² The Members of Parliament Local Area Development Scheme (MPLADS) is a scheme which was formulated by the Government of India in 1993 to enable Members of Parliament (MPs) to recommend developmental work in their constituencies, with an emphasis on creating durable community assets based on locally felt needs. Currently, the Scheme has been suspended by the Union government for two years so as to utilise its funds to mitigate the impact of COVID-19. See, ‘Explained: What are MPLAD funds, suspended over COVID-19 crisis?’ *The Indian Express* (New Delhi, 7 April 2020) <<https://indianexpress.com/article/explained/mplad-funds-covid-19-coronavirus-6350358/>> accessed 25 June 2021.

²⁰³ The legality of the Members of Parliament Local Area Development Scheme (MPLADS) was challenged in the Supreme Court of India in 1999, 2000, 2003, 2004 and 2005. The combined judgment upholding the constitutionality of the scheme was delivered in 2010.

²⁰⁴ In this case, the MPLADS was challenged by Bhim Singh, Founder of the Jammu and Kashmir National Panthers Party. The ground for challenging the Scheme was the alleged misuse of funds allocated under it. See, Press Trust of India, ‘Apex Court rules MPLAD Scheme constitutional’ *Mint* (New Delhi, 6 May 2010) <<https://www.livemint.com/Politics/BxTnyAsELjGq5ZIUy2vR8K/Apex-court-rules-MPLAD-scheme-constitutional.html>> accessed 25 June 2021.

- the use of Article 282 as an alternative channel of transfers would disrupt the delicate fiscal equilibrium which the Finance Commission is expected to bring about through the regular channel under Article 275, and the framers of the Constitution could not have intended such disruption;²⁰⁵
- the placement of Article 282 under a separate heading 'Miscellaneous Financial Provisions' independent from Articles 268 to 281 under the heading 'Distribution of Revenues between the Union and States' manifests the resolution to exclude it as an alternative channel of transfers from the Centre to the States.²⁰⁶

The petitioners squarely contended that any “*expansion of the scope of Article 282 would necessarily result in the corresponding abridgement of the scope of Article 275, which could not have been intended by the Constitution makers.*”²⁰⁷ While arriving at a decision, the Supreme Court examined the entire process of transfer of funds from the Centre to the States. The Court held that both Article 275 and Article 282 are sources of making grants.²⁰⁸

In its interpretation of Article 282, the Supreme Court gave it a wide scope. The Court observed that both the Union and the States have the power to make grants under Article 282, even beyond their respective legislative competence under the Seventh Schedule, for a ‘public purpose’. *Per* Justice P Sathasivam, two important conclusions were arrived at:

- ‘*Owing to the quasi-federal nature of the Constitution and the specific wording of Article 282, both the Union and the State have the power to make grants for a purpose irrespective of whether the subject matter of the purpose falls in the Seventh Schedule provided that the purpose is “public purpose” within the meaning of the Constitution.*’²⁰⁹
- ‘*Both Articles 275 and 282 are sources of spending funds/monies under the Constitution. Article 282 is normally meant for special, temporary or ad hoc schemes. However, the matter of expenditure for a “public purpose”, is subject to fulfillment of the constitutional requirements. The power under Article 282 to sanction grant is not restricted.*’²¹⁰

The Court went on to say that Article 282 cannot be given a restrictive interpretation by reference to other Articles as it is not subject to any other provision of the Constitution.²¹¹ Hence, Article 282 should be given the widest possible construction and no fetters can be placed on the scope of Article 282.

In its discussion of welfare schemes formulated by the Union by means of grants under Article 282, the Supreme Court took recourse to the Directive Principles of State Policy (Directive Principles). The Court did not dispute that several welfare schemes were sponsored and were being formulated by the Central Government in implementation of the Directive Principles.²¹² Even though the subject matter of such schemes fell within the legislative competence of the States, they were being implemented through grants out of the Consolidated Fund of India.²¹³ In light of this observation, the Court held that the MPLADS is in furtherance of the Directive Principles, its aims falls within the realm of ‘public purpose’, and it is constitutionally valid.²¹⁴ The exact reasoning of the Court is mentioned thus:

²⁰⁵ *Bhim Singh v. Union of India*, (2010) 5 SCC 538 para 6.

²⁰⁶ *Bhim Singh v. Union of India*, (2010) 5 SCC 538 para 42.

²⁰⁷ *Bhim Singh v. Union of India*, (2010) 5 SCC 538 para 43.

²⁰⁸ *Bhim Singh v. Union of India*, (2010) 5 SCC 538 para 97(3).

²⁰⁹ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 97(1).

²¹⁰ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 97(3).

²¹¹ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 49.

²¹² *Bhim Singh v Union of India* (2010) 5 SCC 538 para 56.

²¹³ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 51.

²¹⁴ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 52.

*“The expression “public purpose” under Article 282 should be widely construed and from the point of view of the Scheme, it is clear that the same has been designed to promote the purpose underlying the directive principles of State policy as enshrined in Part IV of the Constitution of India. It is not in dispute that the implementation of the directive principles is a general responsibility of the Union and the States. The right to life as enshrined in Article 21 in the context of public health is fully within the ambit of State List Entry 6, List II of the Seventh Schedule.”*²¹⁵

On the basis of the above reasoning, the Supreme Court held that Article 282 can be a source of power for emergent transfer of funds like the MPLADS.²¹⁶

The judgment in *Bhim Singh* makes for rather curious reading. Pertinently, the Supreme Court acknowledged the existence of several welfare schemes formulated by the Union through Article 282 bypassing grants through the Finance Commission under Article 275. The decision established that the Union has the discretion to make grants to the States under both Article 275 and Article 282. However, even though the decision in *Bhim Singh* gave a wide interpretation to the scope of Article 282, it contradictorily maintained that the provision under Article 282 was meant for special, temporary or ad hoc schemes. As pointed out by Nirvikar Singh, “the final conclusion of the Court remained somewhat self-contradictory, however, because it simultaneously assigned great breadth and discretion to transfers under Article 282, while still maintaining that its provisions were normally meant for special, temporary, or ad hoc schemes.”²¹⁷ Nevertheless, *Bhim Singh* effectively validated the existence of CSSs as a constitutional channel for effecting transfers from Centre to the States for a wide range of development activities, through grants under Article 282.²¹⁸

B. Conclusion and Key Takeaways

The opinions tendered during the term of the Ninth Finance Commission, particularly Venugopal's, was an attempt in summing up the constitutional position surrounding intergovernmental transfers. One key observation emerging from his opinion was that the official interpretation of the two provisions – Articles 275 and 282 – effectively resulted in the progressive reduction in the jurisdiction of the Finance Commission to recommend grants-in-aid of the revenues of the States, while the vast reservoir of discretionary power claimed by the Centre under Article 282 has progressively enlarged.²¹⁹ The scope for discretion was further widened by the fact that one particular institution – the Planning Commission – assumed a pivotal role in the implementation of Article 282. As the judicial position currently stands, *per Bhim Singh*, the use of Article 282 to channel CSSs does not run contrary to the federal architecture of the Constitution.

Keeping the above in consideration, the next Chapter makes an attempt to understand (and propose) how Article 282 ought to be interpreted.

Key Takeaways

The legal opinions given to the Ninth Finance Commission point towards two crucial aspects – first, that Article 282 was not envisaged to be a regular channel of transfers between the Centre and the States; second, in accordance with Article 280(3)(b), the Finance Commission is empowered to recommend grants under Article 282 as well.

²¹⁵ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 52.

²¹⁶ *Bhim Singh v Union of India* (2010) 5 SCC 538 para 58.

²¹⁷ Nirvikar Singh (n 82).

²¹⁸ Anupama Kumar, 'Centrally Sponsored Schemes and Centre-state Relations: A Comment' (August 2020) *Dvara Research Working Paper Series No. W.P.-2020-05*, 6 <<https://www.dvara.com/research/wp-content/uploads/2020/08/Centrally-Sponsored-Schemes-and-Centre-state-Relations-A-Comment.pdf>> accessed 24 April 2021 ('Kumar').

²¹⁹ Ninth FC Papers (n 168) 210.

As per the current legal position, in accordance with Bhim Singh, the use of Article 282 to channel transfers via CSSs is not unconstitutional. Per Bhim Singh, Article 282 cannot be given a restrictive interpretation by reference to other Articles as it is not subject to any other provision of the Constitution.

V. How should Article 282 be interpreted?

The preceding chapters give compelling insights into the historical background of the drafting of the financial provisions of the Constitution, the practical underpinnings of intergovernmental transfers, and how Articles 275, 280 and 282 have been understood in existing literature. This puts us in good stead to provide an interpretation to Article 282 which is harmonious with the constitutional scheme of fiscal relations. Part A of this Chapter parses through judgments of the Supreme Court which have used ‘federalism’ as a tool for interpreting provisions of the Constitution. The principle of interpretation emerging from an analysis of these judgments, coupled with the perceived intention of the framers and the fiscal federal architecture of the Constitution, will be applied to interpret Article 282. In Part B, this interpretation, arrived at through a constitutional analysis, will then be linked to existing literature on CSS-reform from other disciplines.

A. Re-interpreting Article 282

Article 246 of the Constitution read with the three lists of the Seventh Schedule divides legislative powers between the Centre and the States. At present, the Union List includes 100 entries over which Parliament has exclusive powers, the State List has 61 entries over which State Legislatures have exclusive powers, and both Parliament as well as State Legislatures can make laws regarding the 52 entries contained in the Concurrent List. According to Article 254(1), in case of a conflict between the provisions of a Central law and those of a State law on a Concurrent List entry, the central law will prevail and the conflicting provision of the State law provision will be repugnant. Articles 73 and 162 link the executive powers of the Union and the States to the aforesaid legislative powers of Parliament and State Legislatures respectively. As far as executive powers over Concurrent List entries are concerned, the proviso to Article 162 provides that the States’ executive power “*shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.*”

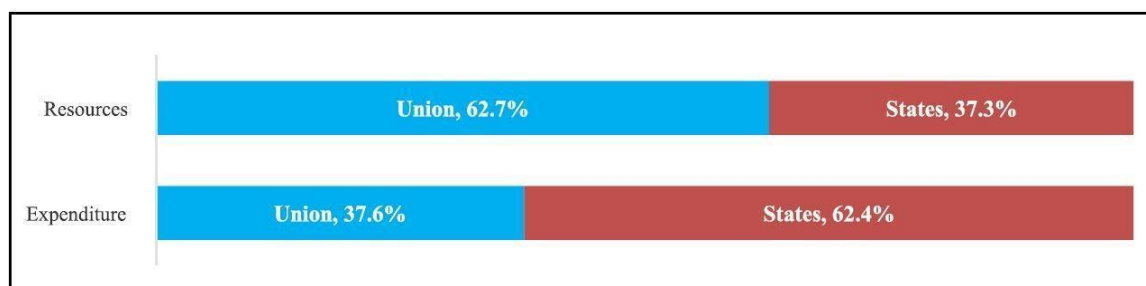
The List system of the Seventh Schedule thus forms the bedrock of the Constitution’s federal structure and its division of powers. Its origins can be traced to the colonial era, with the GoI Act 1935 also containing a Seventh Schedule with three lists, viz. the Federal, Provincial, and Concurrent Legislative Lists. Prior to the enactment of the GoI Act 1935, the JCR of 1934 explained the rationale behind distributing legislative powers in this form as “*an essential feature of Provincial Autonomy and as being itself the means of defining its ambit.*”²²⁰ Thus, the enumeration of entries in the lists of the Seventh Schedule was originally deemed necessary as a means to constitutionally safeguard the autonomy of the States. Beyond the historical background to India’s Constitution, a historical analysis of federal constitutional design across jurisdictions reveals that federal constitutions are characterised by the constitutional entrenchment of provincial autonomy in some form or the other.²²¹

For any government to meaningfully exercise its powers over the matters that have been constitutionally allotted to it, it is critical that it has adequate fiscal resources. Looking at the Seventh Schedule lists, it emerges that while the Centre has been assigned greater revenue raising powers, major expenditure responsibilities such as public order, public health, and agriculture have been allotted to the States. This is illustrated in **Figure IV** below.

²²⁰ JCR (n 31) 124.

²²¹ Giacomo Delledonne, ‘Enumerated Powers in Federal Systems’ (2017) *Max Planck Encyclopedia of Comparative Constitutional Law*.

Figure IV



[Source: Report of the Fifteenth Finance Commission, 2020]

To account for this vertical fiscal imbalance, the Constitution provides for a comprehensive framework of fiscal federalism in Part XII involving multiple and regular channels of fiscal transfers from the Centre to States, which was briefly alluded to in the Introduction to this report. *First*, Article 270 provides for tax devolution, which involves distributing the taxes levied and collected by the Union between the Union and the States. *Second*, Article 275 provides for grants-in-aid to be made to the States. The percentage of tax devolution and the making of grants-in-aid are based on the recommendations of the Finance Commission, a constitutional body appointed by the President every five years under Article 280. *Third*, Article 282 provides for discretionary grants, under which CSSs are made, that are outside of the formal purview of the Finance Commission (unlike tax devolution and grants-in-aid). These grants can be made by either the Centre or any State “for any public purpose”. Unlike tax devolution and grants-in-aid, CSSs are discretionary grants that are outside of the formal purview of the Finance Commission.

While tax devolution under Article 270 is unconditional, grants-in-aid under Article 275 and CSSs under Article 282 can be conditional, as we have seen. Since grants-in-aid are made subject to Finance Commission recommendations, these recommendations also include stipulations regarding the conditions to be attached to these grants. But since grants under Article 282 are not subject to Finance Commission recommendations as aforesaid, the Centre is free to exercise its own discretion in designing the conditions attached to CSSs. Interestingly, Article 282 goes on to state that the ‘public purpose’ for which grants can be made under it need not correspond with Parliament’s law-making powers. This is what enables all the CSSs which cover State List subjects, such as all the health CSSs.

From having analysed the historical background to the fiscal federal architecture and opinions expressed by eminent constitutional law scholars on the scheme of intergovernmental transfers, it is reasonable to conclude that the framers of the Constitution did not envisage grants under Article 282 to be a major or regular channel of fiscal transfers. This can also be seen through Article 282’s placement under the sub-chapter titled ‘Miscellaneous Financial Provisions’. As opposed to this, tax devolution under Article 270 and grants-in-aid under Article 275 fall under the sub-chapter titled ‘Distribution of Revenues between the Union and the States’, along with the provision on the Finance Commission (Article 280). Given the vertical imbalance and the critical importance of fiscal resources in order to fulfill constitutional obligations, the Constitution does not allow the Centre to unilaterally determine fiscal transfers through these major channels. Instead, it created a neutral, dedicated constitutional body under Article 280, i.e., the Finance Commission, to make recommendations. A combined reading of *Chapters II, III and IV* of this report reveals that this carefully crafted framework of fiscal federalism was only meant to be supplemented by the additional, miscellaneous channel of discretionary fiscal transfers under Article 282.

However, we have seen that since the very start, the Centre has been heavily relying on this miscellaneous channel of fiscal transfers. In fact, the use of CSSs was regularised to the extent that it had its own dedicated institutional framework, i.e., the Planning Commission, set up by an executive resolution and not envisaged by the Constitution.²²² As mentioned in *Chapter III* of this report, until 2014 when the Planning Commission was dissolved, CSSs formed part of plan transfers which were regularly made as per Planning Commission

²²² Nirvikar Singh (n 82).

recommendations. Despite some efforts over the years in rationalising and reducing the number of CSSs as noted previously, they remain a significant channel of transfers. According to the Budget Estimates for 2021-22, up to 23 per cent of the total fiscal transfers to States are set to be through the route of CSSs.²²³

This poses a constitutional conundrum. As explained above, the division of powers between the Centre and the States as per the Seventh Schedule is the constitutional bedrock of Indian federalism. The very purpose behind constitutionally enumerating and demarcating the powers of the Centre and the States was to safeguard and guarantee the autonomy of the latter. For this autonomy to be meaningful, the States need to have adequate fiscal resources, as well as some autonomy over the use of these resources. Only then will the States be able to determine their own legislative and executive priorities, pursue them as per their discretion, and customise their interventions based on local conditions and needs. Fiscal transfers through the route of tax devolution, being unconditional in nature and based on Finance Commission recommendations, support and further State autonomy. While grants-in-aid are often conditional, at least these conditions are not determined unilaterally by the Centre, as they too are subject to Finance Commission recommendations. But conditional grants under CSSs, by enabling the Centre to unilaterally dictate terms, upend this fine constitutional balance.

Article 282 begins with a non-obstante clause, which allows it to operate as an exception to Articles 73 and 162 which limit the Centre's executive power to the Union and Concurrent List matters. This exception is limited to making grants for a public purpose, including on State List subjects. In other words, the power granted by Article 282 is only for the purpose of incurring expenditure and cannot be seen as a plenary source of legislative or executive power.²²⁴ This means that the Constitution does not envisage the Centre, through its use of Article 282, determining the policy with respect to a matter that is not within its competence as per the Seventh Schedule. The States retain exclusive legislative and executive autonomy over State List subjects in the manner provided under Articles 246 and 162; the Centre acting under Article 282 can only spend money on State List subjects.

However, by imposing extensive, rigid, and minute conditions for States to avail funds through CSSs, the Centre has been using its grant-making power in a manner that effectively binds the States' legitimate executive and legislative power. For instance, the Constitution gives exclusive powers to the States in the matter of public health. But in practice, States have to modify and curtail the use of their power over public health in a manner that conforms to the conditions attached by the Centre to CSSs. It is true that States themselves agree to be bound to these conditions by signing Memorandums of Understanding with the Centre for availing specific CSSs. However, looking at the overall picture, States are not left with much choice in the matter, given their structural and fiscal reliance on the Centre coupled with the Centre's use of CSSs. Moreover, even the States' ability to implement centrally designed CSSs is limited by the quantum of the grant that they are able to avail from the Centre,²²⁵ which in turn is determined by the States' adherence to CSS conditions. The States' exclusive executive power under Article 162 has thus been effectively made subject to the Centre's discretionary spending power under Article 282.²²⁶ In this way, CSSs under Article 282 erode State autonomy and indirectly subvert the federal structure of the Constitution.

As we have seen, this has been controversial. On Article 282, the State Government of Tamil Nadu stated the following in its memorandum to the Fourth Finance Commission:²²⁷

"It could never have been the intention of the framers of the constitution that this Article should be over-worked so as to become the more important instrument of financial assistance to the states and thus permit the center to assume control even over subjects which are solely within the competence of the states."

²²³ Transfer of Resources to States and Union Territories with Legislature, Union Budget [2021-22] Ministry of Finance, Government of India, <www.indiabudget.gov.in/doc/Budget_at_Glance/bag3.pdf> accessed 21 April 2021. Data compiled from State Finance Accounts and Union Budget, 2018-19.

²²⁴ Anupama Kumar (n 218) 9.

²²⁵ Anupama Kumar (n 218) 12.

²²⁶ Anupama Kumar (n 218) 12.

²²⁷ Nirvikar Singh (n 82).

As noted previously, the Planning Commission used to be in the spotlight frequently due to its role in determining State development priorities through Five-Year Plans and plan transfers,²²⁸ its extra-constitutional nature, and the sidelining of the constitutionally envisaged Finance Commission. As cited in *Chapter IV*, Palkhivala had taken the view that the power to make discretionary grants under Article 282 was in the nature of a residuary power. In his opinion, the proper and regular channel for making grants to States should be grants-in-aid under Article 275, made on the basis of Finance Commission recommendations.²²⁹

This long and varied line of criticism against the nature and extent of the Centre's use of CSSs, and its implications for State autonomy and federalism, came to its head in 2010 before a five-judge Constitution bench of the Supreme Court in *Bhim Singh v. Union of India*,²³⁰ which was discussed in the previous Chapter. As mentioned earlier, while some of the issues discussed before the Supreme Court were specific to the design of MPLADS, arguments and observations were also made regarding the scope of Article 282 and the use of CSSs more generally.

Some aspects from *Bhim Singh* discussed in the previous Chapter merit repetition. In *Bhim Singh*, it was argued before the Court that by enlarging the scope of Article 282 and using CSSs as an alternative channel of regular fiscal transfers, the Centre had disrupted the delicate fiscal equilibrium which the Constitution had sought to create through the regular channel of Finance Commission-recommended grants-in-aid under Article 275. It was also argued that unlike grants-in-aid under Article 275 which can be permanent, long-term, and regular, discretionary grants under Article 282 were only intended to meet an emergency or an unforeseen situation. In the view of the petitioners, the power under Article 282 was only a power to incur expenditure and did not enable the Centre to exercise executive power over the domain of States.

The Supreme Court, in a unanimous judgment, rejected the above arguments and held that the expression 'public purpose' in Article 282 should be widely construed. Going through a series of case laws, the Court took the view that the Constitution was "not strictly federal" and was "only quasi-federal", and observed:

*"....Every Article of the Constitution should be given not only the widest possible interpretation, but also a flexible interpretation to meet all possible contingencies which may arise even in the future. No Article of the Constitution can be given a restrictive and narrow interpretation, particularly, when the said Article is not otherwise subject to any other Article in the Constitution...."*²³¹

It is worth recalling that the Court, while holding that the power under Article 282 was unrestricted, also observed that Article 282 is normally meant for special, temporary or ad hoc schemes.

This judgment represents the current position of the law regarding the interpretation of Article 282. However, the judgment's reliance on the so-called 'quasi-federal' nature of the Constitution to arrive at the conclusion that no constitutional provision can be given a restrictive and narrow interpretation warrants further scrutiny.

Over the years, the Supreme Court has made several observations regarding the Constitution's federal nature, and in many cases used these observations in interpreting the scope of constitutional provisions. Early examples of this include *Atiabari Tea Co v. State of Assam*,²³² and *Automobile Transport (Rajasthan) Ltd v. State of Rajasthan*²³³ which were regarding the Constitution's provisions on freedom of trade, in Part XII. In these cases, the Supreme Court held that the federal structure of the Constitution ought to be considered when interpreting particular provisions of the Constitution.

²²⁸ H K Paranjape, 'Planning Commission as a Constitutional Body' (1990) 25 (45) *Economic and Political Weekly* 2479.

²²⁹ Ninth FC Report (n 167).

²³⁰ (2010) 5 SCC 538 ('*Bhim Singh*').

²³¹ *Bhim Singh v Union of India*, (2010) 5 SCC 538 para 49.

²³² AIR 1961 SC 232.

²³³ AIR 1962 SC 1406.

A major development in the use of federalism in constitutional interpretation was its inclusion in the basic structure doctrine that emerged in *Kesavananda Bharati v. State of Kerala*.²³⁴ Although originally meant as a test to judicially review constitutional amendments, elements of the basic structure were soon used by the Supreme Court in interpreting existing constitutional provisions as well. In the landmark case of *S.R. Bommai v. Union of India*,²³⁵ a nine-judge Constitution bench of the Supreme Court was tasked with determining the scope of judicial review of proclamations of the President's rule under Article 356. Justice P.B. Sawant's opinion in *S.R. Bommai* noted that:

*"...Democracy and federalism are the essential features of our Constitution and are part of its basic structure. Any interpretation that we may place on Article 356 must, therefore, help to preserve and not subvert their fabric...."*²³⁶

The opinion authored by Justice B.P. Jeevan Reddy in this case took the view that *"the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States."*²³⁷ It also observed that *"... federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle..."*²³⁸ Thus, we see that the apex court in *S.R. Bommai*, relying on the federal principle being part of the Constitution's basic structure, interpreted Article 356 in a manner that upheld federalism. This involved narrowing the scope of the Centre's power under Article 356 to check the imposition of President's rule on illegitimate or arbitrary grounds.

Citing *S.R. Bommai*, the Supreme Court in *I.T.C. Ltd v. Agricultural Produce Market Committee*,²³⁹ observed that *"The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of State Legislature and preserves federalism while also upholding the central supremacy as contemplated by some of its articles."*²⁴⁰ In the more recent case of *Jindal Stainless Ltd v. State of Haryana*,²⁴¹ the Supreme Court observed:

*... the provisions of our Constitution are aimed at vesting and maintaining with the States substantial and significant powers in the legislative and executive fields so that States enjoy their share of autonomy and sovereignty in their sphere of governance. This can in turn be done by interpreting the provisions of the Constitution including those found in Part XIII in a manner that preserves and promotes the federal set-up instead of diluting or undermining the same.*²⁴²

...

*An approach which tends to dilute the federal character of our Constitutional scheme must, therefore, be avoided and one that supports and promotes the concept of federalism preferred by the courts while interpreting the provisions of the Constitution.*²⁴³ (emphasis supplied)

There are many more examples in which the apex Court has made similar observations. Essentially, the Constitution's federal structure, especially after the emergence of the basic structure doctrine, has consequences for constitutional interpretation. The core idea is that constitutional provisions should not be interpreted in a manner that leads to the subversion or undermining of this federal structure. On the contrary, they should be interpreted and applied in a manner that preserves, upholds, and promotes this federal structure. It should also be

²³⁴(1973) 4 SCC 225.

²³⁵ (1994) 3 SCC 1.

²³⁶ (1994) 3 SCC 1 para 96.

²³⁷ (1994) 3 SCC 1 para 276.

²³⁸ (1994) 3 SCC 1 para 276.

²³⁹ (2002) 9 SCC 232.

²⁴⁰ (2002) 9 SCC 232 para 59.

²⁴¹ (2017) 12 SCC 1 paras 84, 88.

²⁴² (2017) 12 SCC 1 paras 85.

²⁴³ (2017) 12 SCC 1 paras 88.

noted that the Supreme Court's use of the federal principle in interpreting constitutional provisions has not been uniform or consistent. In some cases, such as *Kuldip Nayar v. Union of India*²⁴⁴ and indeed *Bhim Singh*, the Court relied on the quasi-federal label to reject interpretations that overtly favoured federalism.

Specifically, on the subject of labels, it is worth noting that Justice A.M. Ahmadi's opinion in *S.R. Bommai* stated that although 'quasi-federal' might be an appropriate description of the Indian Constitution, it went on to declare, "... but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy..."²⁴⁵ Similarly, Justice Sawant's opinion in *S.R. Bommai* also observed that theoretical labels such as quasi-federal are not important, since it is the "practical implications of the provisions of the Constitution which are of importance."²⁴⁶

In the 2018 case of *Government of N.C.T. of Delhi v. Union of India*,²⁴⁷ Chief Justice Dipak Misra's judgment quoted the aforesaid observation in Justice Ahmadi's opinion and stated that "the need is to understand the thrust and implication of a provision",²⁴⁸ and as such, "these theoretical concepts [such as quasi-federal] are to be viewed from the practical perspective."²⁴⁹ This judgment also stated, unequivocally, that "Whatever be the nature of federalism present in the Indian Constitution, whether absolutely federal or quasi-federal, the fact of the matter is that federalism is a part of the basic structure of our Constitution..."²⁵⁰ Even more tellingly, it proceeded to claim that "It could never have been the Constituent Assembly's intention that under the garb of quasi-federal tone of our Constitution, the Union Government would affect the interest of the States."²⁵¹

These pronouncements help contextualise the apex Court's decision in *Bhim Singh*. The interpretation given by the Court to Article 282 in *Bhim Singh* enabled the Centre to carry on with its existing practice of making discretionary grants in the form of CSSs to States. As we have seen, these CSSs are often on State List subjects, with rigid and detailed conditions, and have the practical consequence of eroding State autonomy over their legitimate, constitutionally allotted domains. There is a strong argument to be made, and indeed it was made before the apex court in *Bhim Singh*, that this practice, seen as a whole, undermines the Constitution's federal structure. As such, it would have been very much in keeping with the apex court's own jurisprudence if the Constitution Bench in *Bhim Singh* would have chosen to give a narrower interpretation to Article 282, looking at its practical implications and without unduly relying on labels such as quasi-federal.

What would such an interpretation have looked like? As mentioned above, the judgment itself observed that Article 282 is meant for special, temporary, or *ad hoc* schemes, but curiously refrained from ensuring that that provision is in fact used for those purposes alone. A more holistic and harmonious interpretation would have taken into account the Constitution's overall federal structure, and in particular its fiscal federal structure. Such an interpretation would have held that the Centre's power under this provision should be used in a manner that upholds the Constitution's federal structure. This would imply that the use of discretionary grants should not supplant the major routes of fiscal transfers to States, which as aforesaid are tax devolutions under Article 270 and grants-in-aid under Article 275 as per Finance Commission recommendations. Rather, discretionary grants should merely supplement those channels, on a temporary basis and for special, exceptional cases alone. This would mean requiring a significant reduction in the share of CSSs in the total fiscal transfers made to States.

Preserving the Constitution's federal balance would not just require a reduction in the proportion of CSSs, but also changes in their design and features. Under the guise of rigid CSS conditions, the Centre has been effectively dictating the States' exercise of executive powers, as outlined above. Instead, CSS conditions should focus on capacity building that enable the States to make their own decisions. The States should be involved in the planning

²⁴⁴ *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

²⁴⁵ (1994) 3 SCC 1 para 24.

²⁴⁶ (1994) 3 SCC 1 para 100.

²⁴⁷ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

²⁴⁸ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501 para 125.

²⁴⁹ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501 para 124.

²⁵⁰ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501 para 108.

²⁵¹ *Government of NCT of Delhi v. Union of India*, (2018) 8 SCC 501 para 110.

stage itself and should be consulted when designing CSSs. On Concurrent List matters, the Centre should focus on playing a more facilitative and coordinating role between States. A lot of the existing literature critiquing CSSs and arguing for reform make suggestions along similar lines.

B. Implications for CSSs

Given the precedent established by *Bhim Singh*, the use of Article 282 to effectuate CSSs is not unconstitutional *per se*. However, there is a persuasive case to be made that this practice deviates from the vision established by the scheme of fiscal relations under the Constitution, and the intention of the framers. The pervasive use of CSSs has undoubtedly dented the federal balance between the Centre and the States. Additionally, there are concerns associated with the design of CSSs as well, some of which have been flagged in *Chapter III* above. Having said that, CSSs constitute a significant proportion of fiscal transfers to States. Coupled with the fact that questions around their constitutionality have been put to rest (for the time being, at least), it is reasonable to assume that fiscal transfers via CSSs are here to stay.

If Article 282 is to continue to be a vehicle for effecting and implementing CSSs, it is imperative that the constitutional framework of fiscal relations and the judicial use afforded to ‘federalism’ in constitutional interpretation is married with best practices from other disciplines which are crucial to crafting such schemes. A conception of Article 282 which is harmonious with the constitutional scheme points to a narrower use of CSSs, to be used in a way that merely supplements the regular channels of Centre-State fiscal transfers, namely, tax devolution (under Article 270) and grants-in-aid (under Article 275). While taking note of the number of CSSs currently in operation, the Fifteenth Finance Commission pertinently mentioned the need to stop funding for those CSSs (as well as their sub-components) which have “*either outlived their utility or have insignificant budgetary outlays not commensurate to a national programme.*”²⁵² Besides reducing the number of CSSs which are currently operational, this can be done by promoting certain changes in the design of CSSs.

In light of the interpretation of Article 282 in line with the principles mentioned above, how do we design and operate CSSs? A potential answer to this can be found in existing recommendations for reform of CSSs. The Fifteenth Finance Commission has recommended that CSSs should be ‘*flexible enough to allow States to adapt and innovate.*’²⁵³ While citing the Pradhan Mantri Jan Arogya Yojana (PM-JAY) as an example, the Fifteenth Finance Commission recommends that CSSs should grant States the latitude to tailor mechanics of implementation to local realities.²⁵⁴

Insofar as the design of CSSs is concerned, existing recommendations stress upon a shift from the existing “input-based conditions” to “output-based” ones. The Fifteenth Finance Commission recommends thus:

“*There is a need to shift the focus of inter-governmental fiscal health financing from inputs to outputs/outcomes while advancing the measurement agenda as an accountability tool. Complementary to the flexibility noted above, the Union Government can shift the focus of CSS and transfers away from line-items and activities and towards outputs and outcomes, with States being empowered to choose their own pathways to achieve results....*”²⁵⁵

This, the Finance Commission recommends, can be ensured by arriving at “bilaterally-agreed compacts” between the Centre and States. In pursuance of these compacts, the Centre can finance States based on specific objectives they plan to achieve under a scheme, as opposed to exhaustively discussed implementation plans.²⁵⁶

²⁵² Fifteenth FC (n 8) 369.

²⁵³ Fifteenth FC (n 8) 279.

²⁵⁴ Fifteenth FC (n 8) 279.

²⁵⁵ Fifteenth FC (n 8) 279.

²⁵⁶ Fifteenth FC (n 8) 279.

Currently, CSSs operate on the basis of Memorandums of Understanding that States sign with the Centre, reflecting a one-size-fits-all approach.²⁵⁷ From the very outset, there should be more meaningful collaboration between the Centre and State Governments in the design of CSSs, allowing them to adapt and innovate.²⁵⁸ The Fifteenth Finance Commission cites the NHM's movement towards greater flexibility as an illustration.

A review of existing literature in public finance and economy which centres on reforms of CSSs is precluded by space and the scope of this report. It is, however, worth mentioning that an interpretation of Article 282 that furthers State autonomy necessitates a relook at the universe of CSSs, how they are designed, and how they are implemented.

C. Conclusion and Key Takeaways

As mentioned above, the use of Article 282 to authorise and effectuate CSSs is not *per se* unconstitutional. This potentially means that CSSs are here to stay, and possibly, even proliferate. Against that backdrop, a reworked interpretation of Article 282, which uses federalism as a principle, accounts for the scheme of fiscal federal architecture of the Indian Constitution, and the intention of the framers of the Constitution, is desirable. Crucial to this reworked interpretation will be the idea that constitutional provisions should not be interpreted in a manner which undermines the federal structure of the Constitution. Applying this to Article 282 will lead to crafting of CSSs which are a product of rigorous consultation with States, and which account for localised needs and interests.

Key Takeaways

Federalism has become an important tool/ principle for interpreting provisions of the Constitution. Pursuant to the jurisprudence of the Supreme Court, this interpretive practice has been well-established.

Article 282 should be interpreted by using the Supreme Court's understanding afforded to federalism as a principle. To that end, Article 282 should be interpreted in a manner which upholds the Constitution's federal structure, as well as the intentions of the framers of the Constitution.

In practice, this should translate to a reduction in the number of CSSs, and reforms in their designs which facilitate States' localised needs and interests.

²⁵⁷ An example of such a MoU is the one entered between the Ministry of Health and Family Welfare, Government of India and the State of Haryana with respect to the National Rural Health Mission. See, National Rural Health Mission, 'Memorandum of Understanding Between Ministry of Health and Family Welfare, Government of India and Government of the State of Haryana' (2013) <http://nhmharyana.gov.in/files/mou_final.pdf> accessed 25 June 2021.

²⁵⁸ See Arghya Sengupta et al., 'Examination of the legal basis for conditional transfers to States and issues relating to performance-based incentives for States' (2019) Vidhi Centre for Legal Policy, p. 29, submitted to the Fifteenth Finance Commission <https://fincomindia.nic.in/writereaddata/html_en_files/fincom15/StudyReports/Examining%20the%20legal%20basis%20for%20conditional%20transfers%20to%20States%20and%20issues%20relating%20to%20performance%20based%20incentives.pdf> accessed 25 June 2021.

VI. Conclusion

The crux of this research is Article 282 of the Constitution, and the manner in which its interpretation and implementation have unfolded in practice. Several government-commissioned research studies have expressed dismay over the use of Article 282 as a means of authorising CSSs which affect policy priorities of States over subjects which fall strictly within their legislative and executive domain.

Pursuant to the Supreme Court's decision in *Bhim Singh*, the use of Article 282 to sanction grants is not restricted. Resultantly, given the current legal and judicial position, proliferation of CSSs via Article 282 is not *per se* unconstitutional. However, while *Bhim Singh* is the current final word on this subject, there is a strong case to be made that CSSs cause significant inroads into the fiscal autonomy of States, besides also upending the scheme of fiscal federalism established under the Constitution.

While *Bhim Singh* holds the ground insofar as interpretation of Article 282 is concerned, this report challenges some of the principles used in that case. The practical use of Article 282, while running against the grain of the constitutional scheme, has severe implications for States' fiscal priorities. To that end, a reworked understanding of Article 282 carries both academic as well as practical implications.

Against the backdrop of this analysis, this report has attempted to interpret Article 282 in light of the scheme of fiscal federalism under the Indian Constitution and the manner in which the Supreme Court itself has interpreted constitutional provisions that have federal implications over the years. Effectively, this report recommends interpreting Article 282 in light of federalism and argues for an interpretation that upholds and promotes the federal principle, as opposed to the present position that has the practical effect of undermining it. The Supreme Court, in a long line of cases, has extensively used federalism as part of the basic structure doctrine (and otherwise) to interpret constitutional provisions in this manner. Building on this understanding, the report recommends that grants under Article 282 should only be made for special or temporary purposes, and this power should not be used in a manner that supplants the regular, appropriate channels of transfers under Articles 270 and 275. This would mean reducing the number of CSSs overall, but it also has implications for CSS design, which should be reformed in a manner that enables flexibility and State innovation.

Such an interpretation, which is embedded in an understanding of federalism that furthers State autonomy, must manifest itself in the manner of devising CSSs to account for peculiar State interests and localised needs. While CSSs can continue to exist, the mechanics of crafting CSSs can be reformed by establishing a more State-friendly (and federalism-furthering) interpretation of Article 282. The interpretation of Article 282 proposed in this report will be crucial to CSSs, in general, as well as for CSSs pertaining to public health, in particular.

Annexure I: Seventh Schedule Entries corresponding to Table 1

List II

Entry 2. Police (including railway and village police) subject to the provisions of entry 2A of List I.

Entry 5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self government or village administration.

Entry 6. Public health and sanitation; hospitals and dispensaries.

Entry 8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

Entry 9. Relief of the disabled and unemployable.

Entry 10. Burials and burial grounds; cremations and cremation grounds.

Entry 13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

Entry 17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

List III

Entry 16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

Entry 18. Adulteration of foodstuffs and other goods.

Entry 19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.

Entry 20. Economic and social planning.

Entry 20A. Population control and family planning.

Entry 23. Social security and social insurance; employment and unemployment.

Entry 24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

Entry 25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

Entry 26. Legal, medical and other professions.

Entry 29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

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